

STATE OF INDIANA)
) SS:
COUNTY OF DELAWARE)

IN THE DELAWARE COUNTY SUPERIOR COURT

CRAIG DUNN and PHILIP WILEY,)
et al.,)
 Plaintiffs,)
)
 -v-) CAUSE NO.
) 18D01-9305-CT-06
RJR NABISCO HOLDINGS)
CORPORATIONS, et al.,)
 Defendants.)

VOLUME I

The deposition upon oral examination of
NICKI C. TURNER, M.D., a witness produced and sworn
before me, Thomas A. Richardson, RDR-CM, Notary
Public in and for the County of Marion, State of
Indiana, taken on behalf of the defendants at the
offices of Medical Consultants, 2525 University
Avenue, Muncie, Indiana 47303, on October 22, 1997,
at 9:30 a.m. pursuant to the Indiana Rules of Trial
Procedure.

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(Exhibit(s) 1 marked for
identification).

NICKI C. TURNER, M.D.

having been first duly sworn to tell the
truth, the whole truth, and nothing but the
truth took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. OHLEMEYER:

Q Good morning, Doctor. My name is Bill
Ohlemeyer. And I represent a number of the
defendants in this case. And forgive me for
a second while I talk as I look at the
material you produced to us this morning.

We are here to take a deposition in a
case involving Mildred Wiley and her husband
Philip Wiley. And there is a court reporter
here who is going to transcribe the
questions I ask you and the answers you
give. There are a number of other lawyers
here who represent various parties in the
case.

I doubt that everybody is going to ask
you questions. I would be surprised if more
than a small number of us asked you
questions. And I would be surprised if

1 anybody has more than a small number of
2 questions to ask you compared to the number
3 of questions I'm going to ask you.

4 All of that doesn't give you a lot of
5 information yet, but I point it out just to
6 let you know that everybody is not here to
7 ask you questions.

8 One of the first things I need to tell
9 you is that we need to speak to each other
10 verbally. You have to answer "yes" or "no."
11 I have to ask questions, and the court
12 reporter has to take them down. When I ask
13 you a question, hopefully, it will be a
14 question that can be answered verbally. And
15 you will have to answer it verbally. Is
16 that okay?

17 A Yes.

18 Q Have you ever been deposed before?

19 A Yes.

20 Q How many depositions do you think you have
21 been involved in?

22 A Maybe four.

23 Q And what have they generally involved?

24 A One was for a disability hearing. And the
25 other -- well, I guess I really haven't.

1 Maybe two or three. Two were for -- I
2 really can't remember what they were for,
3 the purpose. They were for people that -- I
4 really can't remember. I've not been sued,
5 so it wasn't like I was giving a deposition
6 for myself. It was for other individuals.

7 Q Okay. Connected with your practice as a
8 doctor?

9 A Yes.

10 Q Have you ever given a deposition that had to
11 do with Mildred Wiley before today?

12 A No.

13 Q Let me just tell you a couple of things I'm
14 sure you already know. If you want to take
15 a break at any time, let me know, and we
16 will take one.

17 A Yes.

18 Q And if you don't understand a question I ask
19 you, will you let me know?

20 A Yes.

21 Q All right. We have asked you to produce
22 some material connected to the case. And
23 you have produced a large amount of
24 material. Can you describe for me generally
25 what this is, "this" being the material I

1 have in front of me, that you have produced
2 for us today?

3 A You asked for the chart that I have. And
4 that's what we have from both the attorneys'
5 office for Young & Young as well as the
6 hospital. And you asked for -- we did not
7 see Mildred in our office. So we have no
8 records here from being seen in the office.

9 You asked for literature, and that's
10 exactly what that is. You asked for my
11 information regarding my Barney and Calvin
12 program, and that's what that is.

13 Q At some point today, when it's convenient --
14 and probably we aren't going to waste a lot
15 of time -- we are going to need to make some
16 kind of record or I will ask you some more
17 specific questions about this. Is it in any
18 particular order?

19 A Not really. The records probably are on the
20 top. And that's to do with Barney and
21 Calvin.

22 Q We may refer to this as we go along at
23 various points in the day. But at this
24 point, Doctor, give me a second. And I'm
25 just going to --

1 A My CV is in there as well.

2 Q Where did you obtain the medical literature
3 that I find here? Does this all come from
4 the library or do people send it to you?

5 A People send to it me -- well, physicians
6 give it to me -- and the library.

7 Q Are there any sources of information about
8 smoking and health that you find
9 particularly helpful or enlightening? If
10 somebody in your position was going to try
11 to develop a little knowledge about smoking
12 and health, where would you recommend they
13 go look?

14 A There's a number of articles. There are two
15 or three articles from the New England
16 Journal of Medicine that I have referred
17 patients to or people to and, of course, the
18 Surgeon General's reports.

19 Q Do you generally find the New England
20 Journal of Medicine to be an authoritative
21 source of information about medical issues?

22 A Yes.

23 Q Doctor, can you describe for me what your
24 specialty is.

25 A I do critical care medicine, internal care

1 medicine.

2 Q What does that mean?

3 A That means that I take care of seriously ill
4 individuals. I take care of anything from
5 trauma to I have taken care of a lot of
6 different disease processes. I take care of
7 internal medicine. I have a subspecialty in
8 clinical nutrition as well.

9 Q You say you take care of critically ill
10 patients. Define "take care" for me.

11 A I admit them. I get referred in from other
12 hospitals. I take care of them during their
13 hospital stay. I somewhat orchestrate what
14 subspecialists come in. If I have a
15 multiple trauma come in, I go from the
16 emergency room or whenever I'm called into
17 the case and obtaining the appropriate
18 subspecialists. Or oftentimes the
19 subspecialists call me into a case.

20 Q Does taking care involve diagnosing or
21 assisting in the diagnosis of their disease?

22 A Yes.

23 Q Does it involve treating the disease when
24 it's appropriate and as appropriate?

25 A Yes.

1 Q Does it involve determining what caused the
2 particular disease at issue?

3 A Yes.

4 Q Tell me the circumstances in which you are
5 involved in determining what caused a
6 disease that you're involved with.

7 A What disease would you like me to describe?

8 Q That's a good question. Leave aside acute
9 disease. Let's talk about chronic diseases.
10 Let me ask you this: How would you define a
11 chronic disease?

12 A Chronic disease would be any disease that
13 would occur over any number of months to
14 years.

15 Q Is cancer a chronic disease?

16 A Can or cannot be. It depends on how quickly
17 it's diagnosed.

18 Q In your practice, how often are you called
19 upon to determine the cause of a particular
20 cancer?

21 A I'm not an oncologist. I get called -- I'm
22 called to treat patients with lung problems,
23 with pain that has not been diagnosed. And
24 I go from the etiology, the symptoms, and
25 backwards to what is causing the pain and

1 then from there the diagnoses. That's for
2 the etiology. I mean, if they have been
3 exposed -- I always ask for an exposure
4 history. I try to take a complete history
5 when I talk to a patient. That's all I can
6 tell you. I don't quite understand that
7 question, I guess.

8 Q I assume there are times where you have
9 opinions about what might have caused a
10 particular disease in which you're involved.
11 I take it that's correct?

12 A Yes, most physicians do.

13 Q Are there times as a medical doctor here at
14 the hospital where, in connection with
15 diagnosing and treating the disease, you are
16 asked to determine its cause?

17 A By treating a disease, are we talking about
18 diabetes?

19 Q You're right. Let's be specific. Let's
20 talk about cancer. In fact, you even talked
21 about lung problems. Let's talk about lung
22 cancer.

23 How often, when you are involved in the
24 diagnosis or treatment of a lung cancer, are
25 you called upon by another doctor or other

1 members of the staff here to determine the
2 cause of that cancer?

3 A I'm not called. I'm asked for my opinion,
4 and I will give that opinion. But I mean,
5 that's an oncologist's or epidemiologist's
6 role to do that in the long scope of things.

7 Q Does your specialty have a Board
8 certification?

9 A My critical care boards, yes.

10 Q So you are Board certified in critical care?

11 A No, I'm Board eligible.

12 Q What is the difference between being Board
13 certified and Board eligible?

14 A Board certified means you have passed the
15 test. Board eligible means that you have
16 taken -- Board certified and Board eligible
17 means you have gone through a source of
18 training or a length of training. And Board
19 certified and Board eligible depends on
20 whether you have passed the test or not.

21 Q Are you Board certified?

22 A I'm Board certified in internal medicine and
23 clinical nutrition.

24 Q And Board eligible in --

25 A Critical care.

1 Q Is critical care a subspecialty of internal
2 medicine?

3 A Yes.

4 Q Have you taken the critical care board?

5 A Yes.

6 Q And what is involved then in becoming Board
7 certified as as opposed to Board eligible?

8 A Board certified means that you have taken
9 the boards. You have also completed a time
10 in a critical care fellowship, which I have
11 done. I have taken the two-year critical
12 care fellowship.

13 Q What remains then or what are you lacking in
14 order to obtain the Board certification in
15 critical care medicine?

16 A Passing the boards.

17 Q How often have you taken it?

18 A Once.

19 Q How often can you take them?

20 A Six times. I think five or six times.

21 Q That's a bad question. Can you take them
22 every week or every month or is it once a
23 year?

24 A I think it's like every two years.

25 Q When did you first take those boards?

1 A I can't even remember. Probably back in
2 '88, perhaps '88 or '89. It was the first
3 time they were offered.

4 Q I guess I mean, is there a reason connected
5 with your employment why you haven't taken
6 them again or do you have no interest in
7 them?

8 A No. The point is I'm so busy now, it would
9 not make one difference in my practice, I do
10 not believe. And I've thought about taking
11 them again. When I took them, I -- when I
12 took them, I had been ill the summer before.
13 And I had been very, very seriously ill.
14 And so I took them two months later, I
15 believe.

16 I have not taken them again because I
17 didn't think I needed it. I'm extremely
18 busy. I have a number of patients in the
19 house. I can't be busier than I am.

20 Q I know the feeling. Do you belong to any
21 professional associations?

22 A Yes.

23 Q Which ones?

24 A American College of Nutrition; American
25 College of Physicians; American Thoracic

1 Society; American Trauma Society; American,
2 I guess, College of Critical Care Medicine.
3 I can't think of all of them.

4 Q Do you teach any classes to medical
5 students?

6 A Yes.

7 Q Which classes do you now teach and tell me
8 what classes you have taught in the past.

9 A I have taught pulmonary medicine, basics of
10 pulmonary medicine, to I think they were
11 sophomore medical students. And I've taught
12 regarding clinical nutrition.

13 Q In your pulmonary medicine classes, what
14 textbooks do you use?

15 A I can't tell you that.

16 Q Do you have textbooks you refer to or books
17 you refer to in that area?

18 A Yes, but I can't tell you the authors. They
19 are at the library, you know.

20 Q I mean, if I came to you and said I want to
21 read up on pulmonary medicine, what would
22 you tell me to go read?

23 A There's a number of clinical -- there's a
24 number of books on pulmonary medicine. I
25 wouldn't be able to tell you the author

1 right now. I can't remember.

2 Q I guess is it fair to say one's as good as
3 the other?

4 A There are some that are better than others,
5 the way they are written, the way they are
6 organized.

7 Q Are you involved in any civic associations
8 or do you have any appointments to any civic
9 community boards, boards of directors?

10 A Not right now, no.

11 Q Have you been in the past?

12 A Yes.

13 Q Which ones?

14 A I was named to Muncie's Environmental Board,
15 and then there was also a tobacco task force
16 that I was named to.

17 Q What was the purpose of the tobacco task
18 force?

19 A To try to get public buildings and
20 restaurants smoke free.

21 Q And when was that?

22 A I think it was three or four years ago. I
23 can't remember.

24 Q One way to accomplish that would obviously
25 be to stop the sale of tobacco products.

1 And people have different opinions about
2 that. What do you think about whether or if
3 cigarettes should be sold in this country?

4 THE WITNESS: What does that have
5 to do with this situation?

6 MR. OHLEMEYER: Well, there are a
7 lot of questions, Doctor, that the rules
8 allow us to ask that aren't specifically
9 related to Mrs. Wiley. And whether or if
10 any of that gets used beyond today, somebody
11 else decides somewhere else. But for the
12 time being, we get to ask a number of
13 questions that aren't specifically related
14 to Mrs. Wiley.

15 A So the question is: Do I think?

16 Q Do you think they ought to ban cigarettes?

17 A Yes.

18 Q Is that a view that you have come to
19 recently or have held in the past?

20 A I have held in the past.

21 Q When did you form that opinion?

22 A Probably the 1970s.

23 Q And how did you form it? What was it that
24 caused you to form that opinion?

25 A Well, most of it was because of my patients

1 that I had been taking care of during my --
2 I was a nurse before I was a physician. And
3 I took care of patients then. And as I
4 became a physician because of the patients I
5 have taken care of.

6 Q And what was it about your relationship with
7 those patients that led you to come to that
8 conclusion?

9 A I've taken care of a number of patients that
10 have died and have been critically ill, have
11 lost legs, have had major surgeries, that
12 have had strokes, a number of reasons why I
13 felt that this product should not be sold.
14 I think that these patients are victims, and
15 they are addicted. And then they become
16 very ill.

17 Q You have produced for us today a big stack
18 of what a lot of us would refer to or
19 describe as medical literature. Is that
20 right?

21 A Yes.

22 Q And "big stack" is my word. I'm not holding
23 you to that. I'm not using that to try to
24 describe it. But what I want to know is
25 explain for me what medical literature is.

1 A Medical literature is experts that have --
2 are either researchers or clinicians would
3 do a study or review literature, previous
4 literature, present literature, and come up
5 to some summaries and conclusions about a
6 subject.

7 Q So these people have background or
8 experience in a specific field?

9 A Yes.

10 Q And they create either an experiment or a
11 study?

12 A Or they review the literature.

13 Q Or they review the work of others?

14 A Yes.

15 Q And then they draw conclusions from that
16 work?

17 A Yes.

18 Q And they write it up in a report?

19 A Yes.

20 Q Do they typically have to submit it to
21 another group of people to decide whether or
22 if their conclusions should be published, I
23 guess?

24 A Yes.

25 Q And what then is the point of publishing

1 those opinions or those conclusions?

2 A Well, it would hopefully to be informing
3 other individuals, specifically clinicians
4 that read that literature.

5 Q Inform them of advances, developments, ideas
6 connected to those fields?

7 A Yes.

8 Q Is that process a dynamic one? By that, I
9 mean, does the fact that one group of people
10 does a study and publishes results, does
11 that encourage or create interest in other
12 people doing the same thing?

13 A It's hard to say. Some individuals do
14 studies for the sake of money. Others do
15 studies for the sake of the work that they
16 are doing. It depends on what forces are
17 around them.

18 Q When you say "for the sake of money," what
19 do you mean by that?

20 A There are some clinicians, research people,
21 that apply for government funds and do
22 funds -- I mean, they are essentially
23 professional researchers.

24 Q Because they can obtain money to sponsor the
25 research?

1 A In certain fields, yes.

2 Q Have you ever done any original research in
3 the areas of smoking and health?

4 A No.

5 Q Have you ever published any of these types
6 of papers in the areas of smoking and
7 health?

8 A No.

9 Q What about with regard to the etiology of
10 lung cancer? Have you ever done any
11 original research with respect to the
12 etiology of lung cancer?

13 A No.

14 Q Have you published any papers with respect
15 to the relationship between cigarette
16 smoking and lung cancer?

17 A No.

18 Q Do you subscribe to any medical journals?

19 A Yes.

20 Q Which ones do you subscribe to?

21 A Annals, Annals of Internal Medicine;
22 Clinics, Clinics of Chest Medicine; American
23 Journal of Medicine. There's a number of
24 them.

25 Q Are there others you read and review on a

1 regular basis?

2 A Yes.

3 Q Which ones are those?

4 A I review Trauma, Clinics, Critical Care,
5 American Journal of Medicine, New England.

6 Q Are you familiar with Devita's book, "Cancer
7 Principles and Practice of Oncology"?

8 A No.

9 Q What about Dal and Hammer, "Pulmonary
10 Pathology"?

11 A Dal and Hammer, if that's one of the books I
12 have. I have several books at home that I
13 read, but I don't look at the authors.

14 Q It's a big blue book.

15 A Yes.

16 Q That's the one?

17 A Yes.

18 Q So you have that book?

19 A Yes, if that's the one I have. It's a
20 two-volume book.

21 Q What about Thurlbeck and Churg, "Pathology
22 of the Lung"?

23 A No. I have an old edition of that. The new
24 edition is in the library. I review it as I
25 need to.

1 Q Alsner, et al., "Comprehensive Textbook of
2 Thoracic Oncology"?

3 A No. I'm not an oncologist. I'm a critical
4 care.

5 Q And that's to say there's a difference in
6 what you are required to do with respect to
7 the patient and what the oncologist is
8 required to do?

9 A To a certain extent, yes.

10 Q We have talked a little bit -- I don't want
11 to spend a whole lot of time on this, just a
12 couple more questions -- about cigarettes
13 and cigarette smokers. Am I correct that
14 you have expressed your opinion that
15 cigarette smokers are -- and I don't want to
16 put words in your mouth. Are they all
17 addicted to cigarette smoking or just some
18 number of them addicted to cigarette
19 smoking?

20 A Since I'm not a cigarette smoker, it's hard
21 for me. I think many of them are addicted
22 to cigarette smoke. It depends on how long
23 they have been smoking. It depends on their
24 age.

25 Q Would a diagnosis of addiction be something

1 that you would be qualified or comfortable
2 in making in a cigarette smoker?

3 A Yes.

4 Q On what basis?

5 A How long they have been smoking, have they
6 tried to quit, how many times they have
7 tried to quit, what happens when they quit,
8 what type of side effects they have when
9 they try to quit.

10 Q Do critical care physicians typically
11 diagnose and treat patients for addictions?

12 A Well, our group here, we have six
13 physicians -- five physicians that are
14 active now.

15 We are somewhat different than most
16 critical care physicians. If you go to a
17 large center that primarily -- that
18 intensivists normally practice at, they do
19 not do as much internal medicine as we do
20 here.

21 We have five physicians that do a
22 combination of -- we kind of transcend
23 subspecialties because of our geographical
24 areas. We get referrals from a number of
25 counties. So we're asked to do things that

1 intensivists are often not normally asked to
2 do.

3 Q You're not the type of doctor that people go
4 to see for diseases of the mind or other
5 psychiatric or psychological disorders,
6 right?

7 A Usually not. I have had patients that I
8 have been referred in because the family
9 physician didn't know what to do with them.
10 And they were -- I refer them to other
11 individuals, including psychiatry.

12 Q Certainly you don't hold yourself out as a
13 psychiatrist or psychologist?

14 A No.

15 Q You don't have the type of insurance that
16 would allow you to diagnose and treat those
17 types of diseases, do you?

18 A No.

19 Q And if you had a question about psychiatry
20 or psychology in one of your patients, you
21 typically would consult in or refer in
22 someone else at the hospital, wouldn't you?

23 A For psychiatric illness, yes.

24 Q Do you think addiction is a psychiatric
25 illness?

1 A I do not believe so.

2 Q How would you describe it? What kind of
3 illness is it?

4 A Well, it's kind of semantics. Addiction --
5 I mean, people are addicted to alcohol as
6 well. And you don't always have to have a
7 psychiatrist see an alcoholic to treat
8 alcoholism. So it's similar, you know, to
9 the same area.

10 A psychiatrist or a psychologist would
11 see an individual with psychoses or
12 schizophrenia, severe manic-depressive
13 disorders, severe depression. But
14 addiction, I mean, people are addicted to a
15 number of things.

16 Q So if I understand what you're saying, for
17 pharmacological or certain types of
18 addictions, you would be more comfortable
19 having a psychiatrist or a psychologist
20 involved. For behavioral or other types of
21 addictions, you're --

22 A What kind of addictions are you talking
23 about to a psychiatrist? I mean, what kind
24 of addictions would be referred to a
25 psychiatrist?

1 Q Heroin?

2 A Not always.

3 Q Let me ask you this: You mentioned the word
4 "semantics." Is there an issue of semantics
5 when it comes to the idea of "addiction"?

6 A Addiction is addiction. Addiction is a
7 physiological effect that occurs when
8 individuals go without a substance they have
9 been using, whether it be heroin or
10 marijuana, or primarily heroin or cocaine or
11 whatever.

12 Q Is that how you would define addiction? Are
13 there other definitions?

14 A Of physiological, there are both
15 physiological as well as I guess you could
16 term psychological addiction.

17 Q Behavioral?

18 A Behavioral addiction. But primarily it's
19 psychological, from both alcohol as well as
20 nicotine.

21 Q Like I said, I don't want to spend a lot of
22 time on this. But does the fact that
23 someone is addicted to cigarette smoking, as
24 you have defined it, prevent them from
25 quitting smoking?

1 A Yes.

2 Q Let me ask the question again to make sure
3 we both understand.

4 Does the fact that someone is addicted
5 to cigarette smoking, as you have defined
6 it, prevent them from quitting? Let me
7 rephrase the question. Does it make it
8 impossible for them to quit?

9 A It makes it very difficult. And to some
10 individuals, it can make it impossible.

11 Q I'm sorry to interrupt. Finish your answer,
12 if you want. I was going to ask you how you
13 figure out when it's impossible and when
14 it's difficult.

15 A It depends on the success. It depends on
16 what we have to do to try to help them off
17 the drug. Am I answering your question?

18 Q Yes, that's fine. Anything else? I'm
19 sorry, Doctor. And I apologize for this.
20 There are times where I may be looking at
21 something while you're still answering your
22 question. I don't mean it as disrespect or
23 disinterest. I'm trying to kind of look at
24 some things to save some time as we move
25 along. You can tell we have a lot of

1 material in front of us.

2 I read a newspaper article about you
3 where they described you as an anti-smoking
4 crusader.

5 A I'm not a crusader. If you have ever had
6 anybody from the press talk about you, they
7 put words in your mouth.

8 Q I have.

9 A And they change things. And they try to
10 sell newspapers.

11 Q Amen. So you wouldn't consider yourself an
12 anti-smoking crusader?

13 A No.

14 Q Would you consider yourself an anti-smoking
15 activist?

16 A Not really.

17 Q I saw a couple of pieces of information in
18 the material you produced today that dealt
19 with tobacco control and the Tobacco
20 Products Liability Litigation Project. Does
21 that ring any bells for you?

22 A Tobacco Litigation Project, what is that?

23 Q I will just ask you this way: Do you think
24 that lawsuits against tobacco companies
25 should be used as a means of tobacco

1 control?

2 A I would hope that instead of that, there
3 would be legislation or some type of control
4 placed so that we don't have the product.
5 I'm never in favor of litigation because,
6 first of all, there are lawyers involved.
7 And I think it -- I mean, any time we can
8 avoid litigation, I think that's the best
9 way of doing it.

10 Q The reason I ask, I'm holding a piece of
11 information entitled, "Tobacco on Trial:
12 Reporting on Litigation and Other Tobacco
13 Control Strategies" that you produced.

14 A I didn't produce that.

15 Q I'm sorry, "produce" is a term of art.
16 You're right. It was brought to the
17 deposition today by you.

18 A Yes.

19 Q You obviously received this from somewhere
20 else. Do you subscribe to this?

21 A Currently, no; but I did last year.

22 Q Have you in the past?

23 A Yes.

24 Q For what purpose did you subscribe to it?

25 A Primarily for information, and I try to be

1 educated on the subject.

2 Q Was the fact that you were involved in this
3 case or in connection with Mr. Wiley's prior
4 claim one of the reasons you subscribed to
5 this?

6 A Not really. This is a relatively new
7 product that's out. And it allows us to be
8 more informed about the situation across the
9 country.

10 Q The lawsuit situation?

11 A Just information about tobacco.

12 Q Derived from lawsuits though, right?

13 A Well, just any information about tobacco,
14 whether it be from that or -- I have a
15 number of other articles there about tobacco
16 that have nothing to do with litigation.

17 Q You obviously formed some opinions -- well,
18 the Surgeon General of the United States
19 obviously formed some opinions in the 1960s
20 about smoking and health. You formed some
21 in the 1970s. Why is it do you think
22 cigarettes are still sold in this country?

23 MR. JAS. YOUNG: I will object to
24 that. That's completely irrelevant to the
25 issues of the case. It has nothing to do

1 with Mildred Wiley or any of the issues we
2 are here to talk about.

3 MR. OHLEMEYER: From time to time,
4 Doctor, the lawyers can make objections that
5 the judge decides later. So you can go
6 ahead and answer the question.

7 THE WITNESS: Can I answer it?

8 MR. JAS. YOUNG: Sure.

9 THE WITNESS: What was your
10 question?

11 Q I guess you would agree with me in the
12 1960s, the Surgeon General of the United
13 States formed some opinions about smoking
14 and health. Public health organizations
15 have formed opinions about smoking and
16 health. You formed an opinion in the 1970s
17 about smoking and health.

18 Why is it do you think cigarettes are
19 still sold in this country?

20 MR. JAS. YOUNG: Show the same
21 objection.

22 THE WITNESS: Why do you think they
23 are sold?

24 Q My question is: Why do you think people
25 haven't come to the same conclusion that you

1 have that they shouldn't be sold?

2 A A lot of it has to do with education and
3 getting the public to understand what
4 happens to them.

5 Q And do you fault anybody or do you hold
6 anybody responsible for not accomplishing
7 that education?

8 A Yes.

9 Q Who?

10 A The tobacco industry.

11 Q What about the government?

12 A What about the government?

13 Q Well, don't they have a role to play in
14 educating people and providing them with
15 information?

16 A Part of the problem is that the money is not
17 spent in that area. The money is spent in
18 other areas. In the 1970s and 1980s, other
19 things were happening in this country. So
20 the government, they don't do a lot of
21 educating on a lot of things. But it's not
22 the government's role.

23 I mean, if a drug is sold, if Procardia
24 is sold, XL, or Adalat is sold, it's the
25 person that -- it's the company that is

1 producing that that is responsible for the
2 education.

3 Q By law?

4 A Well, it's by law or ethics.

5 Q Let's start with by law. The law requires
6 drug companies, pharmaceutical companies, to
7 provide certain information to consumers or
8 to physicians in connection with the sale of
9 their product, right?

10 A Yes, I guess. I don't know. I'm not a
11 pharmacist, so I don't know.

12 Q Do you know whether there's a law that
13 requires tobacco manufacturers to provide
14 certain information to consumers in
15 connection with the sale of their products?

16 A I don't know.

17 Q Bearing in mind everything you have said
18 about the press, in this same article, you
19 are quoted as saying that exposing
20 youngsters to secondhand smoke is a form of
21 child abuse. Is that a statement you agree
22 with?

23 MR. CROSS: For the record, could
24 you identify the date and source?

25 MR. OHLEMEYER: I'm sorry. July

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Q Do you think children should be removed from homes in which parents or other family members smoke?

MR. JAS. YOUNG: I will object again. We're getting far afield about what we are here to deal with. We are here to deal with Mildred Wiley, and we are here to deal with secondhand smoke exposure in the workplace. And the newspaper articles about Dr. Turner don't have anything to do with this case. I think we should get to the point.

Q Let me rephrase the question, Doctor. Do you think that children should be removed from homes in which a parent or other family member smoke?

THE WITNESS: That's not rephrasing it. That's the same question. What does it have to do with Mildred Wiley? I don't understand what the connotation is.

MR. OHLEMEYER: Like I told you, there are a lot of rules. Just like you have a lot of rules, and I have a lot of rules. I could explain it all to you, but I

1 don't think you want to spend time listening
2 to the Rules of Civil Procedure.

3 A Well, the thing is, I think a lot of parents
4 do things around their children that they
5 don't understand is wrong or is
6 inappropriate for their children.

7 There are a lot that parents do. They
8 fight. They do a lot of things that have an
9 impact on children. But you can't outlaw
10 everything in the home. What we have to do
11 is educate.

12 Q So I take it the answer to my question is
13 you don't think the Division of Family
14 Services should remove children from homes
15 where parents or other family members smoke?

16 MR. JAS. YOUNG: I will object to
17 you testifying and restating her testimony.
18 I will object to the form of the question.

19 THE WITNESS: I guess I don't
20 understand what -- I know what you're asking
21 me. But I don't understand what the impact
22 of this case is regarding that question.

23 Q Well, I guess, maybe I left a part out. In
24 most states, if there is child abuse
25 occurring in the home, it provides a legal

ground for the state to remove children from the home, put them in foster care or Division of Family Services.

My question to you is very simply:
Assuming that you believe that exposing
children to other people's smoke is a form
of child abuse, do you think those children
should be removed from homes where that
occurs?

MR. JAS. YOUNG: I will object again. You are asking this witness to make global decisions and assertions of what goes on in people's homes, asking for legal conclusions. It's completely irrelevant to the case. It has nothing to do with it.

MR. OHLEMEYER: Do you recall the question?

THE WITNESS: Yes.

Q And the answer?

A The answer is I think that with additional education of our public officials as well as parents, I think those problems would be taken care of by parents not smoking around their children. That's the answer. It's additional education from the harmful

1 effects of secondhand smoke.

2 Q So the answer is not removing the children
3 from the home?

4 MR. JAS. YOUNG: I will object to
5 you testifying.

6 A I don't know. You're putting words in my
7 mouth.

8 MR. JAS. YOUNG: You should ask
9 questions. You shouldn't lead the witness.
10 And you should not be rephrasing or trying
11 to restate what she has testified to. I
12 think that's objectionable.

13 Q I have also read in the newspaper -- and I
14 am as sceptical and critical of what I read
15 in the newspaper as you have suggested you
16 are -- that you are an environmental
17 activist. Is that a fair description?

18 A Yes.

19 Q It says that you have purchased and built a
20 nature preserve with a 2-acre pond, a
21 forest, thousands of trees, and a house. Is
22 that true?

23 A I have bought 60 acres of farmland, planted
24 20,000 trees, and am building a house.

25 MR. JAS. YOUNG: Excuse me. What

1 article are you referring to?

2 MR. OHLEMEYER: It's a February 21,
3 1996, article in the Indianapolis News.

4 Q What did you have to do to have it
5 designated as a wildlife habitat?

6 MR. JAS. YOUNG: Objection again.
7 Relevance.

8 A Jeepers. That article was put in at the
9 request of the Department of Natural
10 Resources because they were promoting
11 wetlands and wildlife habitat.

12 Q I guess my question is a little simpler
13 than that. Did you do that because of the
14 tax advantages?

15 A Oh, right, yeah. No, I don't think so.

16 Q There was some suggestion that there are
17 people that do that.

18 A Well, I don't do it. The difference between
19 farmland and putting crops in farmland and
20 wildlife is not that much.

21 Q Have you ever testified, in the three or
22 four or five times you told us about that
23 you testified, about cigarette smoke and its
24 relationship to disease?

25 A I do not recall that I have.

1 Q Did you tell me you have never been involved
2 in a lawsuit as a party in connection with
3 your professional activities?

4 A Not that I'm aware of.

5 Q Have you ever been involved in a lawsuit as
6 a party in any type of situation, either
7 sued somebody or been sued?

8 A I don't think so. I can't recall.

9 Q If you had been sued, you would recall it.
10 Tell me how you prepared for the deposition
11 today.

12 A Well, I reviewed articles that I had
13 reviewed previously, I have reviewed books
14 that I had reviewed previously, and I
15 reviewed the charts.

16 Q Is there any way for you to describe for me
17 with any particularity which articles or
18 which books you reviewed?

19 A They are right in front of you.

20 Q It's this whole --

21 A Well, I reviewed most of those. I reviewed
22 them before.

23 Q Do you recall how long it took you to do
24 that?

25 MR. JAS. YOUNG: To do what?

1 MR. OHLEMEYER: To review that
2 material --

3 MR. JAS. YOUNG: At which time?

4 MR. OHLEMEYER: -- in connection
5 with this deposition.

6 MR. JAS. YOUNG: In what time
7 period?

8 MR. OHLEMEYER: Any time period.

9 Q My question, Doctor, is from the time you
10 learned you were going to be deposed to
11 today, how much time did you spend reviewing
12 this material in preparation for the
13 deposition?

14 A Deposed from what I saw, the letter that was
15 sent last week? Is that your question?

16 Q Let's back up. When did you first learn
17 that you would have to sit down and testify
18 in a deposition in connection with this
19 case?

20 A Probably a number of months. But we weren't
21 sure when.

22 Q From the time that happened, whenever it
23 was, until today, how much time have you
24 spent reviewing charts, books, or articles
25 in connection with this case, this

1 deposition, or the issues that you thought
2 would arise today?

3 A Several hours. I have been extremely busy
4 in my clinical practice. That's one of the
5 reasons why this deposition wasn't last
6 week.

7 Two of my people are out. Two of my
8 partners are out. And I'm extremely busy.
9 And when you get done finishing rounds late
10 at night, you don't have much time.

11 Q So is it fair to say that you haven't spent
12 more than several hours in reviewing this
13 material?

14 A You have to understand that I have read the
15 articles before. And I have reviewed what I
16 felt I needed to review as adequately as I
17 can to be prepared.

18 Q What context did you read the articles
19 before?

20 A For my own information and also for
21 educational purposes.

22 Q Off the top of your head, are there specific
23 books or specific articles that you can kind
24 of point to or identify as seminal or
25 important on the relationship between

1 smoking and health or exposure to other
2 people's smoke and health in this material
3 that you have provided to us?

4 A Well, there's the Surgeon General's report.

5 Q 1986?

6 A Yes. And there's the tobacco papers. And
7 there's a number of articles down there.
8 There is a New England Journal of Medicine
9 article. I believe it's '89, whenever it
10 was. It's been a long time since I looked
11 at the date.

12 I mean, there's a number of articles.
13 I can't tell you authors.

14 Q That's my question. Are there particular
15 authors or particular articles that if
16 somebody said to you, you know, what's the
17 most important or the most seminal or the
18 most informative or the most interesting
19 article about cigarette smoke and its
20 relationship to disease or environmental
21 smoke and its relationship to disease?

22 A What I do is I have the articles. They copy
23 those articles. I give them those or
24 whatever articles at the library at the
25 hospital. And they copy what they want.

1 Q Somewhere within this group of articles that
2 you have provided to us, you would say those
3 are the ones?

4 A Yes.

5 MR. JAS. YOUNG: Counselor, could
6 we take a short break?

7 MR. OHLEMEYER: Yes. Before we do,
8 can I ask what is your position or what's
9 the situation with respect to compensation?
10 Am I obligated to compensate the doctor for
11 her time in preparing the deposition and
12 sitting for the deposition?

13 MR. JAS. YOUNG: We haven't really
14 decided. Sitting for it definitely.

15 MR. OHLEMEYER: What about
16 preparation?

17 MR. RILEY: Let us think in the
18 hallway on that.

19 (A recess was taken from 10:23 a.m. to
20 10:33 a.m.)

21 BY MR. OHLEMEYER:

22 Q Doctor, if you don't understand a question I
23 ask you, will you let me know?

24 A Yes.

25 Q I take it you are not a smoker?

2 | Q Have you ever been a smoker?

4 | Q Have you ever tried a cigarette?

6 Q Do you let friends or family members smoke
7 in your presence?

10 Q Let me ask you this: Do you ask people not
11 to smoke in your presence?

13 Q Can you recall when you first started doing
14 that?

16 That doesn't have anything to do with this
17 case. It doesn't have anything to do with
18 her qualifications. It doesn't have
19 anything to do with Mildred Wiley. Let's
20 get to the meat of the matter.

24 MR. JAS. YOUNG: I object. Same
25 objection.

1 A I can't recall.

2 Q Would it have been in the '80s or the '70s?
3 Can you pin it on a decade?

4 MR. JAS. YOUNG: I will object.
5 It's irrelevant. It has nothing to do with
6 the case.

7 THE WITNESS: Am I supposed to
8 answer?

9 MR. JAS. YOUNG: Yes.

10 A I can't remember.

11 Q That's fine. If you don't remember, you
12 don't remember.

13 When did you form an opinion that
14 exposure to environmental tobacco smoke
15 presented a risk to the health of the
16 nonsmoker?

17 A Probably in the 1980s.

18 Q And what was it that caused you to come to
19 that conclusion?

20 A Articles that were coming out from medical
21 literature.

22 Q Would you agree with me that passive
23 smoking -- and by that, I mean, the
24 inhalation of smoke of tobacco products used
25 by others -- was first associated with human

1 cancer in 1981 when two publications
2 reported higher rates of lung cancer among
3 nonsmoking women married to smokers?

4 A That was by Hiawatha or whatever his name
5 is.

6 Q Hirayama?

7 A Yes.

8 MR. JAS. YOUNG: If you are
9 referring to a certain document, it might be
10 fair to the witness to show her what you are
11 talking about.

12 MR. MR. OHLEMEYER: I'm just asking
13 the question.

14 MR. JAS. YOUNG: My point is it
15 would be fair to let her know what the
16 documents you are referring to are and show
17 them to her.

18 Q Doctor, if you don't understand a question
19 or you don't think the question is fair to
20 you, will you let me know?

21 A Yes.

22 Q My question to you is: Do you agree or
23 disagree that passive smoking -- and by
24 that, I'm defining it as the inhalation of
25 smoke from tobacco products used by

1 others -- was first associated with human
2 cancer in 1981?

3 A I can't tell you that because I think there
4 was some other additional studies that were
5 being done in the 1970s, I believe, by other
6 individuals. Now, that was one of the
7 articles that came out in 1981.

8 Q You talked about your opinions and forming
9 your opinions based on articles that were
10 coming out. Are you familiar with the
11 Hirayama and Trichopoulos studies?

12 A Yes.

13 Q Can you tell me about any studies that came
14 out before about Hirayama or Trichopoulos?

15 A The original question asked whether I had
16 stopped exposure to secondhand smoke because
17 of harm. And another question comes up
18 about cancer. Those are kind of two
19 questions.

20 Q Let me --

21 A Are you talking about cancer or are you
22 talking about just harm?

23 Q My question to you is: When did you first
24 associate exposure to other people's tobacco
25 smoke with cancer?

1 A When did I first associate it? Probably in
2 the '80s.

3 Q And was that as a result of things you had
4 read in the medical literature?

5 A Yes.

6 Q And can you recall reading anything prior to
7 the '80s in the medical literature that
8 associated exposure to other people's
9 tobacco smoke with cancer?

10 A I can't recall now, but that doesn't mean I
11 didn't do it.

12 Q Do you claim any background or any
13 experience in the design or manufacture of
14 cigarettes?

15 A No.

16 Q Do you claim any background or any
17 experience in marketing?

18 A Of cigarettes or tobacco products?

19 Q Of cigarettes, tobacco products, or any
20 other products.

21 A Of cigarettes or tobacco products, no.

22 Q Do you do surgery? Are you a surgeon?

23 A I do procedures. I do not do surgery.

24 Q By "procedures," you mean things like
25 bronchoscopies?

1 A Swans, arterial lines, central lines, those
2 type of procedures.

3 Q You don't consider yourself a pathologist?

4 A No.

5 Q You don't consider yourself an oncologist
6 you told me, right?

7 A No.

8 Q Do you consider yourself an epidemiologist?

9 A No.

10 Q Or a toxicologist?

11 A No.

12 Q Can you describe for me, Dr. Turner, when
13 and how you first became involved with
14 Mildred Wiley?

15 A I was asked to see the patient by Scott
16 Walker. He's an orthopedic surgeon.

17 Q Let me --

18 A Can I have the chart in front of me?

19 Q Sure. What can we give you?

20 A The chart.

21 Q Tell me what you mean by a chart.

22 A The chart is the hospital chart. It has to
23 be with HNT. It has to do with progress
24 notes, what happens during that patient's
25 stay in the hospital.

1 Q Let me tell you it's not a memory test
2 either. I'm just trying to fix some time
3 periods.

4 Is it fair to say, am I correct that
5 before you became involved in the care of
6 Mrs. Wiley, you didn't have a preexisting
7 relationship with her or her husband?

8 A No.

9 Q You didn't know them socially?

10 A No.

11 Q Or professionally?

12 A No.

13 Q Your first contact with them was when she
14 was in Ball Memorial Hospital?

15 A Yes.

16 MR. OHLEMEYER: Let me have tab
17 three. Let me mark this as Exhibit 2.

18 (Exhibit(s) 2 marked for
19 identification).

20 MR. OHLEMEYER: For the record, we
21 have marked Exhibit 1, the Notice. And let
22 me hand you, counsel, a copy of what I'm
23 going to mark as Exhibit 2. This is a --

24 Q Doctor, why don't you tell me what this is.
25 I don't see a title on it. I don't want to

1 "misdescribe" it. It looks like a
2 consultation report dated May 31, 1991,
3 signed by you.

4 A Dated the 30th of May. Yes, I dictated it
5 the 30th of May.

6 Q What is the significance of that 5-31-91?

7 A That's when it was dictated, I mean when it
8 was transcribed.

9 Q So you signed it on the 31st?

10 A I don't know when I signed it. I'm telling
11 you I dictated it on the 30th.

12 Q Very good. And is this your initial
13 description of the patient named Mildred
14 Wiley that's described here?

15 A Yes.

16 Q Would this have been at or near the time you
17 first became involved in Mrs. Wiley's
18 treatment?

19 A Yes.

20 Q Where did the factual information in this
21 report come from?

22 A It came from the patient.

23 Q Did you actually ask her these kinds of
24 questions, the kinds of questions that
25 elicited this information?

1 A Yes, her husband may have been present as
2 well. This lady was in a lot of pain.

3 Q You see in the second sentence there where
4 it says, "The patient has somewhat of a
5 complicated past medical history"?

6 A Yes.

7 Q Is that a conclusion that you reached or a
8 statement that was obtained from Mr. or
9 Mrs. Wiley?

10 A That's my statement.

11 Q What is the basis of your statement that she
12 had a complicated past medical history?

13 A Because she had been under care from -- as
14 you can see on the dictation, she had been
15 seen by several other physicians.

16 Q And for what reason had she been seeing
17 those other physicians?

18 A As you can see, her illness began in October
19 of 1990. So she had been treated -- in
20 January of '91, she was evaluated for
21 possible sinusitis. She was seen by
22 Dr. Toney at the Sports Clinic. She had
23 been seen by Mr. Patel over in Marion. She
24 was seen by Dr. Coombs. And she was seen by
25 Walker.

1 Q Who is Dr. Coombs?

2 A He is an orthopedic surgeon.

3 Q Who is Dr. Walker?

4 A He is an orthopedic surgeon.

5 Q Do you know whether she ever saw an ear,
6 nose, and throat specialist during this time
7 period between October of '90 and May of
8 '91?

9 A I have no recall of that. I mean, I do not
10 know.

11 Q On the second page, the end of that first
12 paragraph, it says the only allergy is
13 sulfa. Is that information you obtained
14 from the patient?

15 MR. JAS. YOUNG: I'm sorry. Where
16 are you?

17 MR. OHLEMEYER: We're on page 2,
18 about four lines up, the first paragraph
19 there.

20 A I would have gotten that from the patient or
21 her husband or some family member.

22 Q It says, "The patient does not drink; nor
23 does she smoke." Do you typically ask
24 patients whether they drink or smoke?

25 A Yes.

1 Q Do you have a set of questions that you ask
2 patients the first time you see them?

3 A Yes.

4 Q And is that called taking a history from the
5 patient?

6 A Yes.

7 Q And is that information considered -- do you
8 consider that information subjective or
9 objective?

10 A Objective.

11 Q What do you mean by that?

12 A That means that it has to do with how we
13 come up with conclusions about how we --
14 what tests we order, what our suspicions
15 are, what's going on with that patient.

16 Q Is it fair to say though, Doctor, a lot of
17 that information is not information that you
18 can observe in the patient?

19 MR. JAS. YOUNG: What information
20 are you referring to?

21 Q Let me rephrase the question. When you take
22 this history, do you ask the patient about
23 things or behaviors or practices that the
24 patient has engaged in in the past?

25 A Yes.

1 Q And those are things, of course, to which
2 you were not an eyewitness, right?

3 A Sometimes you can tell a patient drinks or
4 smokes by sitting in front of them.

5 Q Could you tell whether Mildred Wiley drank
6 or smoked by looking at her?

7 | A No.

8 Q For example, do you treat people who have
9 been exposed to asbestos?

10 A Occasionally I have.

11 Q Occupationally exposed to asbestos?

12 A Yes.

13 Q Can you be tell by looking at somebody if
14 they've been occupationally exposed to
15 asbestos?

16 | A No.

17 Q To the extent you ask them about their
18 occupational history, they have to provide
19 you with some information that's not readily
20 observable; isn't that right?

21 A Yes.

22 Q The same thing in a situation like this. I
23 mean, some of what you are asking Mrs. Wiley
24 is not something that you can immediately or
25 objectively discern; isn't that right?

1 A No, we had to take their word for it.

2 Q And is it fair to say that histories can
3 be -- the accuracy of a history can be
4 affected by somebody's memory or
5 recollection?

6 A Yes. But 99.9 percent of the time when
7 someone is giving you a history, they are
8 searching for help. And they may not be
9 honest with other people, but they are
10 certainly -- I mean, 99.9 percent of the
11 time they are honest with you.

12 Q They are typically sick or in some kind of
13 distress?

14 A They are typically sick and they want help.

15 Q They are talking with a doctor who is there
16 to help them?

17 A Yes.

18 Q So they are doing everything they can to
19 provide you with as much information and
20 with as much accurate information as they
21 can?

22 A Yes.

23 Q Sometimes though, because of their failure
24 of memory, there are limits to what they can
25 tell you?

1 MR. JAS. YOUNG: Is that a question
2 or statement?

3 Q Have you ever experienced that? Let me
4 rephrase the question, Doctor.

5 Can failure of memory affect the
6 accuracy or the reliability of a history?

7 A When you're taking a history from the
8 patient, you can frequently tell just by
9 talking to them whether they are cognizant
10 of their past, if they are leaving points
11 out. And yes, you can tell that, because
12 they leave lapses of memory. You ask them
13 questions. Their mental status, an
14 examination of the mental status that you
15 automatically take with your history. And
16 when you take a history, you can tell
17 whether somebody can remember things, cannot
18 remember things, how accurate they are, how
19 quickly they respond to you. And I would
20 have -- if there was any question, I would
21 have put that in here.

22 Q So if there was any question about
23 Mrs. Wiley's ability to assist you in
24 developing her history, you would have noted
25 it?

1 A Yes.

2 Q What about ignorance though? Can ignorance
3 affect the reliability of a history?

4 A Ignorance for what?

5 Q Well, is it possible that people are
6 ignorant of things that have occurred in
7 their past that might be related to their
8 ill health?

9 A Ignorant or unknowing?

10 Q Either. Unknowing. Let's start with
11 unknowing.

12 A Unknowing, you mean they are not educated
13 enough to know what may have happened to
14 them?

15 Q Or they are unaware of what may have
16 happened to them or to what they may have
17 been exposed to or encountered in their
18 life.

19 A It depends on the educational background of
20 that patient.

21 Q Do you think that people's ignorance -- I
22 don't mean that in a pejorative sense -- or
23 their unknowingness can affect the
24 reliability or accuracy of a history?

25 MR. CROSS: I think that's been

1 asked and answered several times.

2 A I don't quite understand your question.
3 Most people, 99.9 percent of the patients,
4 if they are a fifth grade education, can
5 tell me what's been going on with them.

6 Q Well, can they tell you if they have been
7 exposed to polyvinylchloride?

8 A Polyvinylchloride is a chemical term. If
9 you asked a lay person that -- if I went and
10 asked one of these other doctors, they may
11 not know what that is. They may or may not.
12 But that's a chemical term. You can't ask a
13 patient that.

14 Q I take it you asked Mrs. Wiley if she had
15 been a smoker or drinker at any point in her
16 life?

17 A Yes.

18 Q And besides smoking and drinking, what
19 else -- let me ask you this, Doctor: Are
20 smoking and drinking associated with the
21 subsequent development of disease?

22 A Can be, yes.

23 Q Are there other substances or behaviors that
24 are associated with the subsequent
25 development of disease?

1 A Secondhand smoke, "reminal" tobacco smoke,
2 drug use, intravenous drug use.

3 Q Did you ask Mrs. Wiley if she was an
4 intravenous drug user?

5 A No. If it's not there, I didn't ask her.

6 Q To the extent there are other things that
7 might be associated with subsequent
8 development of disease, including lung
9 diseases like cancer, if you had asked
10 Mrs. Wiley about her history and she had
11 provided you information, it would be here?

12 A Most likely I did not ask intravenous drug
13 use because this patient had a suspected
14 back lesion. If she didn't have
15 hepatitis -- and that was not along in my
16 suspicions -- then I would not have asked
17 that.

18 Q Did you ask Mrs. Wiley if she had been
19 exposed to so-called secondhand smoke?

20 A Yes.

21 Q Why did you ask her that?

22 A I do that to all my patients.

23 Q When did you start doing that?

24 A Probably in the late '80s, mid '80s. It's
25 hard to say. I've been in practice since

1 1983. I may have asked before that when I
2 was in my residency and fellowship. You
3 would have to look at my other histories and
4 physical examinations.

5 Q She apparently told you that she had been
6 exposed to secondhand smoke for
7 approximately 12 years at the VA?

8 A Yes.

9 Q Those were her words?

10 A If I put it down here, it was either her or
11 her husband. She I think gave this history
12 though. I know she did, because she was
13 still awake and was able to talk to me.

14 Q Could you have visualized and remembered
15 this without referring to this? Or is this
16 something that kind of helps you refresh
17 your recollection as to what happened?

18 A Do I remember this patient or do I remember
19 this history?

20 Q Do you remember this history?

21 A I remember this history, yes.

22 Q Why do you remember it?

23 A Well, part of the problem is because of the
24 patient. I remember -- I have multiple
25 trauma patients. I remember what happened

1 to them during their admissions as well. I
2 mean, I just remember certain things. And
3 you can ask my partners that too.

4 Q Do you remember her telling you that she had
5 a private office and had not been exposed to
6 secondhand smoke over the last eight years?

7 A I remember putting it down here, yes. I
8 mean, it's down here. But later on, when I
9 was talking to her husband, I remember him
10 standing in the hallway telling me that she
11 always left her door open. And this was not
12 a private office.

13 Q Let's back up, Doctor. In May of 1991, you
14 asked Mrs. Wiley -- you took a history from
15 Mrs. Wiley; isn't that right?

16 A Yes.

17 Q And she provided you with some information
18 that you recorded and what we have marked as
19 Exhibit 2; isn't that right?

20 A Yes.

21 Q One of the things you asked her was if she
22 was exposed to secondhand smoke?

23 A Yes.

24 Q Did you use the word "secondhand smoke" or
25 was that her word?

1 A I probably used "secondhand smoke."

2 Q Your testimony is that she told you she was
3 exposed to secondhand smoke for
4 approximately 12 years at the VA?

5 A Yes.

6 Q And she also said to you at that time that
7 she had been on a new job over the last
8 eight years, therefore, and has had a
9 private office and has not been exposed to
10 secondhand smoke?

11 A I put that there, yes.

12 Q Because that's what she told you?

13 A Yes.

14 Q And her husband was in the room at the time,
15 wasn't he?

16 A She also told me that --

17 MR. JAS. YOUNG: I will object to
18 the leading form of the question.

19 A I don't know if her husband was in the room
20 or not. I said if the husband was there,
21 then he may have helped with the history.
22 But I can't recall that he was there.

23 Q That's my question: Can you tell me whether
24 or not her husband was present when you took
25 this history?

1 A I cannot tell you that, no.

2 Q You also asked her about allergies, and she
3 told you her only allergy was sulfa?

4 A Yes.

5 Q What is sulfa?

6 A Sulfa is an antibiotic.

7 Q So this then is about at or near the time
8 you became involved in Mrs. Wiley's
9 treatment?

10 A Yes.

11 Q Okay. When did you first meet her
12 attorneys: Messrs. Young, Young, Young,
13 Cross, Howard, Dudley, or Wiley?

14 MR. RILEY: Riley.

15 MR. OHLEMEYER: Riley, sorry.

16 A I don't know. Maybe '93. I don't know.

17 Q Was it before Mrs. Wiley died?

18 A No.

19 Q So it was after Mrs. Wiley died?

20 A It was several years after Mrs. Wiley died.

21 Q Describe for me how that happened, how your
22 first contact with any of those gentlemen
23 occurred.

24 A I got a letter in the mail.

25 Q Do you have a copy of that letter?

1 A I don't know. If it's not in there, I
2 probably don't have a copy.

3 Q What did the letter say?

4 A As I recall, the letter said that they were
5 being retained by her husband.

6 Q To do what?

7 A That's all it said. They were being
8 retained by the husband and that -- I don't
9 even know what the letter said.

10 Q Can you give me any idea when in 1993 you
11 received this letter?

12 MR. JAS. YOUNG: I will object.
13 That's been asked and answered. She said
14 she can't recall.

15 A I can't remember.

16 Q Do you remember whether it was winter,
17 spring, summer, or fall?

18 A No. I mean -- I don't know. I don't know.

19 MR. OHLEMEYER: Let me mark this as
20 Exhibit 3.

21 (Exhibit(s) 3 marked for
22 identification).

23 Q Doctor, let me hand you what we have marked
24 as Exhibit 3 and ask you if you can identify
25 that for us?

1 A It was a dictation that I did.

2 Q At or about when?

3 A May of '93.

4 Q And is this something that you have produced
5 to us this morning in connection with the
6 deposition?

7 A I don't know when I produced this, you know.
8 We talked about this.

9 Q Let me ask you this: Is that something that
10 should be in your file in connection with
11 your care and treatment of Mrs. Wiley?

12 A We didn't have a hospital chart.

13 Q Let's back up. It's clear, isn't it, that
14 you have -- you brought that to the
15 deposition this morning. I didn't bring it,
16 right?

17 A I have not seen this. I went through all
18 those letters. I did not see this.

19 Q You did not see that when?

20 A Last evening or this morning, until now.

21 Q Let me represent to you that that was in
22 that stack of material. Have you seen that
23 before?

24 A Not for several years.

25 Q When is the last time you saw it?

1 A Well, it probably -- I can't tell you when
2 the last time I saw it, because I have not
3 seen this for several years.

4 Q So your testimony is that --

5 MR. JAS. YOUNG: Excuse me,
6 Counsel. I'm confused about the document.
7 I think there is some confusion about when
8 this -- when the part of the chart was not
9 able to be found at one point. Then within
10 the last day, according to Dr. Turner, the
11 chart was found. I think this is -- is this
12 part of the chart that was found?

13 THE WITNESS: Yes. This was not
14 there last night.

15 MR. JAS. YOUNG: Why don't you ask
16 some preliminary questions?

17 MR. OHLEMEYER: Absolutely.

18 Q Let me start here, Doctor. I have in front
19 of me what we have marked as Exhibit 3, a
20 progress note related to Mildred Wiley dated
21 May 24, 1993.

22 A Yes.

23 Q Page 2 is labeled Progress Notes, Mildred
24 Wiley, May 24, 1993.

25 A Yes.

1 Q Attributed to Nicki C. Turner, M.D. And
2 then on the left-hand side, it says
3 "NCT:saw," right?

4 A Yes.

5 Q There is no doubt that you dictated this?

6 A Yes.

7 Q And your secretary or S.A.W., whoever that
8 is, transcribed it for you?

9 A Yes.

10 MR. OHLEMEYER: I take it counsel
11 is familiar with this?

12 MR. JAS. YOUNG: No, I think we
13 haven't seen it because what happened was --
14 let's put it this way: We were advised this
15 morning that part of the file which had not
16 been --

17 MR. OHLEMEYER: Produced.

18 MR. JAS. YOUNG: -- available to
19 the witness, could not be found by the
20 witness -- strike that.

21 Dr. Turner, can you describe for us
22 whether or not any materials with respect
23 to Mildred Wiley's chart have been recently
24 discovered by you and/or your office?

25 THE WITNESS: Yes, just this

1 morning.

2 BY MR. OHLEMEYER:

3 Q And what are they is a better question?

4 A I gave them to you.

5 Q So they are here?

6 A Yes, but I haven't seen them. My question
7 is: I don't know where these things were.
8 That's the question.

9 MR. JAS. YOUNG: The point is you
10 found these in a filing cabinet?

11 THE WITNESS: I don't even know if
12 this was in there. I was back there
13 reviewing it with Sylvia, and I didn't see
14 this. Maybe I didn't look through every
15 single page; I don't know. But they were
16 not in there last night.

17 MR. JAS. YOUNG: This morning when
18 you came in, you found some materials?

19 THE WITNESS: Sylvia did, the
20 secretary.

21 MR. JAS. YOUNG: That you had never
22 seen before?

23 THE WITNESS: I may have seen them,
24 but a long time ago. I gave you everything
25 I had. Remember we went through those.

1 MR. OHLEMEYER: Let me ask counsel
2 a question: Is it your position that this
3 is a document that has not been previously
4 provided to you?

5 MR. JAS. YOUNG: We haven't seen it
6 yet, number one. Number two --

7 MR. OHLEMEYER: Let me ask a
8 question then. Well, go ahead.

9 MR. JAS. YOUNG: Wait a minute.
10 Let's clear this up. We haven't seen this
11 exhibit because you have shown it to the
12 witness, but have just now given it to us.

13 We were advised this morning that
14 Dr. Turner found materials that heretofore
15 had been lost and after what was described
16 to us as a search by Dr. Turner to find the
17 file, just turned up somehow this morning.
18 So what those documents are that were found
19 this morning, we have not seen them.

20 MR. OHLEMEYER: Fair enough.

21 MR. OHLEMEYER: Off the record.

22 (Discussion off the record from 11:01
23 a.m. to 11:02 a.m.)

24 MR. OHLEMEYER: Dr. Turner has
25 produced this morning in response to the

1 request for production --

2 THE WITNESS: Let me rephrase that.
3 This appeared in my file this morning. I
4 produced it for you because I found it. But
5 last night it was not there.

6 MR. OHLEMEYER: Okay. Dr. Turner
7 has physically carried into the conference
8 room a stack of material that is purportedly
9 responsive to the Request for Production
10 that was attached to the deposition notice.

11 We have marked one piece of that
12 material Exhibit 3. I have a couple of
13 other pieces here I want to mark as the
14 next exhibits in order. And we will do
15 that on the record.

16 MR. JAS. YOUNG: From that stack?

17 MR. OHLEMEYER: From that stack,
18 from that same stack. And we have three
19 books on the table that were in that stack,
20 the '84 Surgeon General's report; the '86
21 Surgeon General's report; and Glantz's book,
22 the "Cigarette Papers."

23 What I would like to do -- and I think
24 counsel agrees -- is to take this stack
25 that Dr. Turner has her chart in front of

1 her. And we can keep that here while we
2 ask questions about it, but take the rest
3 of this material, send it to Kinko's, make
4 as many copies as everybody wants, bring
5 one back, make it an exhibit, and then
6 everybody will have a stack of whatever it
7 is we need to have a stack of.

8 MR. JAS. YOUNG: I think that's
9 agreeable. Although I would object to
10 interrogating this witness on those
11 materials that she said she inexplicably
12 found this morning and hasn't even had a
13 chance to look at.

14 MR. OHLEMEYER: I will give her a
15 chance to look at anything we interrogate
16 her on. And that's my point.

17 MR. JAS. YOUNG: I mean prior to
18 the interrogation. I'm not talking about
19 just handing it to her and ask her to read
20 it.

21 MR. OHLEMEYER: We will give the
22 doctor a chance to look at anything she
23 wants to look at. But my thought is,
24 Doctor, if you would segregate the chart
25 from this material, we will put everything

1 else in this stack and send it off to get
2 copied.

3 (Exhibit(s) 4-8 marked for
4 identification).

5 MR. JAS. YOUNG: If you don't mind,
6 I would like the opportunity to ask her some
7 preliminary questions to try and clear up
8 this confusion about the missing chart, the
9 location of the chart recently, and where we
10 stand with the materials that were produced
11 for this deposition.

12 MR. OHLEMEYER: You know,
13 normally -- I'm a nice guy. Go ahead.
14 Normally I wouldn't do that.

15 BY MR. JAS. YOUNG:

16 Q Doctor, was there ever a time that your
17 office chart concerning Mildred Wiley became
18 missing?

19 A Yes.

20 Q And when was that?

21 A Well, we just were able to find it on
22 microfilm. We were able to find it last
23 Friday.

24 Q How long had it been missing?

25 A We've not been able to review the office

1 chart, whatever is left of the office chart,
2 whatever the office chart is we had, for at
3 least two years, two to three years
4 probably.

5 Q Had you during that period of time made a
6 search for the file?

7 A Yes.

8 Q Would you term that an exhaustive search?

9 A Yes, we looked at the microfilm; and we
10 looked at the files where they were. And it
11 was not there.

12 Q Are you saying that it was not able to be
13 located on the microfilm as well?

14 A That's my understanding. I asked for the
15 secretaries that worked for us to look
16 everywhere that chart could be. And they
17 said they could not find it.

18 Q And then as I understand your testimony,
19 this past Friday, less than four days ago,
20 was the chart located on microfiche again?

21 A Yes.

22 Q And what occurred after that?

23 A I had them make a copy and told them to
24 contact you and make sure that you would
25 have available for whatever you needed to do

1 with it and make a copy for myself as well
2 as Dr. Songer since we had not seen it.

3 Q And make it available for the deposition
4 today?

5 A Yes.

6 Q And were you reviewing those materials last
7 evening?

8 A Yes.

9 Q What period of time did you review that
10 material?

11 A I reviewed a number of materials from 8:00
12 to about midnight last night or 12:30.

13 Q And did you come in this morning and review
14 some of the materials again?

15 A Well, I had left -- some of the pages were
16 missing from the articles. Well, some of
17 the pages were missing. And from -- let me
18 clarify.

19 You had left me a chart that you guys
20 had delivered. I reviewed that. I cannot
21 remember if I reviewed the chart from our
22 office. I have reviewed so much.

23 But some of the pages were missing, and
24 I had left a note for Emily, who is my
25 nurse, to call either you or call the

1 hospital and make sure we had a complete
2 file.

3 And then she went into my office. And
4 the chart was in the drawer last night that
5 I had went through entirely. And it was all
6 of a sudden just sitting there.

7 Q When did she go in and find that?

8 A 8:00 this morning or 8:15.

9 Q You're saying at 8:00 o'clock this morning,
10 there were materials that were in the file
11 cabinet drawer that were not in there when
12 you finished at 12:30 last night?

13 A They were not there. I went through that
14 whole file.

15 Q And were those the materials that were in
16 the rubber banded section and have been sent
17 out to be copied?

18 A Yes. Well, I don't know. They were in a
19 rubber band. I don't know how much is what
20 is what.

21 Q They were sent with the materials that were
22 just recently sent out to be copied.

23 A Yes.

24 MR. OHLEMEYER: Or, for the record,
25 they could be here in front of you?

1 A Now, the hospital brought a whole -- the
2 hospital -- we may have asked the hospital
3 to make a copy of their chart too. So this
4 may be all mixed together.

5 Q When you reviewed the materials that showed
6 up this morning that were not in the file
7 cabinet at 12:30 last night, was what has
8 been marked as Exhibit 3 in those materials?

9 A No.

10 Q So those materials, that document,
11 Exhibit 3, was not even in the materials
12 that mysteriously appeared in your file
13 cabinet?

14 A I have not seen this for I don't know how
15 long.

16 Q Was it the first time that you saw that when
17 it was handed to you this morning during the
18 course of your deposition?

19 A For several years. For several years. I
20 think I saw it in the file before it was
21 lost, so-called lost. And then I have not
22 seen it since until just now.

23 Q Did you have an opportunity to examine and
24 study the materials that were located this
25 morning at 8:00 that were not in your file

1 cabinet last night at 12:30?

2 A I went through them very quickly. And if
3 this is it, I went through them. This was
4 not there. I mean, I have not seen this.

5 Q What is this?

6 A This is an emergency room physician --
7 emergency room chart. I have not seen some
8 of this, unless this was from -- this was
9 left -- we will have to talk to Sylvia and
10 figure out which was what. But this I have
11 not seen.

12 MR. OHLEMEYER: I don't want to
13 interrupt. When you say "this" --

14 MR. JAS. YOUNG: When you say
15 "this," it doesn't mean anything.

16 A I'm sorry, the emergency room chart.

17 MR. JAS. YOUNG: Let's mark them.

18 MR. OHLEMEYER: Show me what you
19 are referring to as "this." I mean, hand it
20 to me.

21 THE WITNESS: These papers.

22 MR. OHLEMEYER: These two pieces of
23 paper?

24 THE WITNESS: Yes.

25 A But the point is, I do not understand -- I

1 can't tell you -- these have all been mixed
2 together by people. I can't tell you what
3 of this was in the rubber band that was
4 found in my desk or in my file and what was
5 from the hospital and what you guys brought.
6 I can't tell you what is what.

7 MR. OHLEMEYER: To be fair, Doctor,
8 we came in this morning. And you gave us a
9 stack of stuff. And you pulled stacks out
10 of your briefcase.

11 THE WITNESS: This was not there.
12 I will tell you that. Whatever was left
13 was -- it was in a yellow envelope. That
14 was what they -- exactly what you gave me
15 that you delivered to my office is what was
16 in the yellow envelope.

17 MR. JAS. YOUNG: That has been sent
18 out for copying?

19 THE WITNESS: Probably.

20 MR. OHLEMEYER: My turn?

21 MR. JAS. YOUNG: Well, let's mark
22 those and have her identify those things
23 that were not in there.

24 MR. OHLEMEYER: Right.

25 BY MR. JAS. YOUNG:

1 Q As I understand it, those documents that are
2 being marked, Doctor, are documents that
3 were not in the rubber banded material that
4 mysteriously showed up in your file cabinet
5 this morning?

6 A I can't tell if those were from the hospital
7 or from the rubber banded material. They
8 were not in what I reviewed last evening.
9 I'm sorry it's so confusing. All of this --
10 suddenly appeared.

11 MR. OHLEMEYER: I will hand the
12 court reporter the two pieces of paper the
13 doctor handed to me. And we will mark those
14 as the next two exhibits in order.

15 (Exhibit(s) 9-10 marked for
16 identification).

17 BY MR. OHLEMEYER:

18 Q Doctor, we have taken a rather long break.
19 Mr. Young has asked you some questions. And
20 now I'm going to ask you questions again.
21 First, let me ask you if there is a question
22 I ask you you don't understand, will you let
23 me know?

24 A Yes.

25 Q You referred to the chart a number of times

1 when Mr. Young was asking you questions.
2 What do you mean by the chart? Is that --
3 do you mean three or is something more than
4 Exhibit 3?

5 A Are you talking about a hospital chart, an
6 office chart?

7 Q You kept saying the chart was missing.

8 A Our office chart was missing.

9 Q And what is contained in the office chart?

10 A Well, there is probably a few X-ray reports,
11 whatever was put in that chart about this
12 patient.

13 Q When and how did you determine it was
14 missing?

15 A I can't even remember that. But it was
16 several years -- a couple years ago when I
17 was asked to come up with all the papers
18 that had to do with this case.

19 Q Was it at or near the time that you were
20 asked to prepare the letter that you wrote
21 dated July 20th, 1993, to whom it may
22 concern, concerning the request from the
23 U.S. Department of Labor for information
24 about Mrs. Wiley's death?

25 A I cannot recall.

1 Q Is Exhibit 3 something that should have been
2 in your office chart?

3 A Usually anything that has to do with the
4 patient we leave in the chart.

5 Q Do you know if there is anything else that
6 is missing from the chart, to your
7 knowledge, or does not appear to be in the
8 material that you have collected with
9 respect to Mrs. Wiley in the recent past?

10 A I can't tell you that because I can't
11 remember that, if there was additional
12 records that may have come from the hospital
13 or from the attorneys or you guys.

14 Q Do you recall dictating progress notes after
15 Mrs. Wiley died in addition to those that we
16 have marked as Exhibit 3?

17 A I cannot recall, but I may have. I cannot
18 recall. Without the chart here, I cannot
19 recall.

20 Q If you had done that, should those notes be
21 in the chart?

22 A You would expect they would be. If I
23 dictate, they are done by a stenographer at
24 the office; and everything is kept at the
25 chart.

1 Q What is your secretary's name?

2 A I have several. Sylvia is the one in the
3 phone room.

4 Q Sorry. Who is the secretary that prepared
5 this material for you or helped you look for
6 the material that was missing?

7 A Well, Sylvia would have been one of those
8 individuals. Before Sylvia, there would
9 have been somebody else. We have people
10 that are turning over in the office.

11 Q What is Sylvia's last name?

12 A I don't know. I'm not very good at names.

13 Q Am I correct that at some point in time,
14 between the time you met Mrs. Wiley's
15 attorneys and today, they have prepared and
16 sent to you a chart with respect to
17 Mrs. Wiley?

18 A They sent us copies of the hospital chart I
19 believe.

20 Q Do you have that somewhere in a form that
21 you can say this is what the lawyers sent
22 me?

23 A Well, it was in an envelope, a yellow
24 envelope, that I thought I handed to you.
25 This is not it. It was in a plain yellow

1 envelope with my name on it.

2 Q You would expect to find an envelope in the
3 material we sent out to copy with your name
4 on it?

5 A No, I handed it to you with everything else.
6 If it came out of that briefcase, I handed
7 it to you.

8 Q And everything you have given to me,
9 Dr. Turner, we have agreed --

10 MR. WAGNER: Wait a minute.

11 There's more.

12 A Here it is here. That's what I received
13 from the attorneys.

14 MR. OHLEMEYER: Let me do this.
15 I'm going to put these documents back in the
16 envelope, and we will mark this as the next
17 in order.

18 (Exhibit(s) 11 marked for
19 identification).

20 Q For the record, Doctor, we have marked as
21 Exhibit 11 what you believe to have been the
22 record sent to you from Mrs. Wiley's
23 attorneys?

24 A Yes. And I just received those last week or
25 last week probably, early last week or

1 whenever.

2 Q Do you know from where they obtained these
3 records?

4 A I would surmise from the hospital chart.

5 Q Was there a point in time, do you recall,
6 that people came to your office to collect
7 records pursuant to an authorization with
8 respect to Mrs. Wiley?

9 A I'm not aware of that. They may have.
10 Sometimes I'm gone, and things happen that I
11 would not be able to tell you that.

12 Q It's fair to say that Exhibit 3 was not
13 contained within the material sent to you by
14 the attorneys that we have marked as
15 Exhibit 11?

16 A That was definitely not there, no.

17 Q Can you recall why you prepared Exhibit 3?

18 A The question arose of whether in my opinion
19 this patient's death was caused by
20 secondhand smoke. And in that capacity, I
21 contacted individuals, pathologists, experts
22 in the field before I rendered that opinion.

23 Q And did that question arise at or near the
24 date of Exhibit 3, May 1993?

25 A Around there I suppose.

1 Q How did that question arise?

2 A They just asked me if I felt that this case
3 was related to secondhand smoke.

4 Q And who is "they"?

5 A The attorneys.

6 Q And were they the first people that had
7 asked you that question?

8 A No, her husband did.

9 Q When did he ask you that question?

10 A The day she died or soon before she died.

11 Q What did you tell him?

12 A I felt that that was the only explanation
13 that I had.

14 Q Did you dictate a progress note with respect
15 to that conversation?

16 A No.

17 Q Is there any record that describes or
18 indicates that you told Mr. Wiley on the day
19 Mrs. Wiley died that you had an opinion
20 about the cause of her death?

21 A I put it in my discharge summary, and I put
22 it in the -- when I wrote the death -- the
23 final discharge, when we fill out the final
24 page I believe. I would have to find that.

25 Q Let me hand you what we will mark as the

1 next exhibit in order, which will be
2 Exhibit 12.

3 (Exhibit(s) 12 marked for
4 identification).

5 Q Doctor, this exhibit is the death summary?

6 A Yes.

7 Q That you dictated; is that right?

8 A Yes.

9 Q On or about July 21st?

10 A Yes.

11 Q When did Mrs. Wiley die?

12 A She died -- I would have to look here. I
13 think she died -- do you have the final?

14 Q It's probably -- no, it's not on here. I'm
15 sorry, June 24th.

16 A That's when she died.

17 Q So this was dictated a month after she died?

18 A Yes.

19 Q You see down there near the bottom of the
20 page where it says, "We had to keep pushing
21 the analgesics"?

22 A Yes.

23 Q What does that mean?

24 A I can't find it.

25 Q Three lines up from the bottom, "We had to

1 keep pushing the analgesics."

2 A Because she was in agony. She was in
3 horrible, horrible pain.

4 Q Do you see in the middle of page there where
5 it says, "The patient was seen by Dr. Songer
6 in consultation"?

7 A Yes.

8 Q It says, "He did not feel that this was
9 breast and the question arose whether this
10 may have been primary lung." Can you tell
11 me where that information comes from, how
12 you obtained the information you put in
13 those two sentences?

14 A That he did not feel this was breast?

15 Q Yes.

16 A We discussed this. And we went through the
17 differential of what could probably be the
18 etiology of her primary.

19 Q And when did you do that?

20 A Throughout her admission, throughout her
21 hospitalization.

22 Q And is it fair to say throughout her
23 hospitalization, there was some uncertainty
24 as to where Mrs. Wiley's primary tumor may
25 have arisen?

1 MR. JAS. YOUNG: I object to the
2 form of the question.

3 A Your question is --

4 Q Throughout Mrs. Wiley's hospitalization, was
5 there some discussion among her doctors
6 and/or some uncertainty about the primary
7 site of her cancer?

8 A Her primary site was lung.

9 Q That's your opinion, Doctor. Upon what do
10 you base it?

11 A Well, because when I did a bronchoscopy, the
12 airway was full of tumor. If it was a
13 metastatic lesion, it would have been
14 peripheral. And it was not peripheral.

15 Q Is it your opinion, Doctor, that Mrs. Wiley
16 presented with an endobronchial lesion?

17 A Yes.

18 Q And tell me what that means in laymen's
19 terms.

20 A That means that the growth was from the
21 airway, itself.

22 Q And is it your opinion that that cancer was
23 an adenocarcinoma?

24 A After our biopsies and the transthoracic
25 biopsy, yes.

1 Q What percentage of endobronchial lesions are
2 adenocarcinomas?

3 A I can't tell you that. Normally
4 adenocarcinoma is peripheral. Normally
5 adenocarcinomas are a peripheral lesion.
6 The fact this was an endobronchial lesion
7 was very surprising. And the fact is that's
8 one of the primary reasons, besides the fact
9 it was adenocarcinoma and because of her
10 history, that I felt that this was related
11 to secondhand smoke.

12 Q If this were not an endobronchial lesion,
13 would you still be of the opinion that it
14 was primary to the lung?

15 MR. JAS. YOUNG: I will object.
16 That's calling for speculation. She has
17 already testified it was an endobronchial
18 lesion.

19 Q Let me ask you to assume that this was not
20 an endobronchial lesion. If that were the
21 case, would you still be of the opinion this
22 was a primary carcinoma of the lung?

23 A If it was not an endobronchial lesion, where
24 would it be situated at?

25 Q My question, Doctor, is if it were not an

1 endobronchial lesion, do you have an opinion
2 as to whether it was a primary carcinoma of
3 the lung?

4 MR. JAS. YOUNG: I will object to
5 the question because it's vague and it's not
6 specific enough to allow an appropriate
7 answer.

8 Q Do you understand the question, Doctor?

9 A You asked if this was not an endobronchial
10 lesion, would I still consider this as a
11 primary lung?

12 Q Primary lung cancer.

13 A Yes.

14 Q You would?

15 A Yes.

16 Q Would you still consider it to have been
17 secondary to secondhand smoke?

18 A I think that -- I'm not an epidemiologist,
19 obviously. But the fact that it was a
20 adenocarcinoma, because of her exposure,
21 because there was no other source, I would
22 say it would be highly suspicious that it
23 was related to secondhand smoke.

24 Q Could you say it was with reasonable
25 certainty?

1 A Yes.

2 Q No other source of --

3 A She was not a primary smoker. If she had
4 been a primary smoker, then possibly that
5 would have been related to that. We did not
6 find it in her breast. Everything else
7 pointed to a primary lung.

8 Q I'm going to get into that in a little more
9 detail in a minute. But what about other
10 risk factors for lung cancer? Do you know
11 whether she demonstrated or had encountered
12 any other risk factors for lung cancer in
13 her life?

14 A Ninety percent of lung cancers are related
15 to tobacco. What other risk factors would
16 there be?

17 Q What percentage of cigarette smokers develop
18 lung cancer, Doctor?

19 A Approximately 10 to 15 percent.

20 Q What percentage of lung cancers occur in
21 nonsmokers?

22 A I don't know the exact percentage. It
23 depends obviously on their risk factors as
24 well. If they are around secondhand smoke,
25 I consider them a very high --

1 Q Possibility?

2 A Possibility. Not possibility, but that is a
3 risk factor. I think you have to take
4 everything in context. You can't think
5 everything -- you have to look at the whole
6 picture.

7 Q And that's my question. What other parts of
8 the picture did you have available to you in
9 July of 1991 when you concluded that
10 Mrs. Wiley's cancer was a metastatic
11 adenocarcinoma of the lung, secondary to
12 secondhand smoke?

13 A Because that was the only answer that I
14 could come up with. I mean, it was not
15 pancreatic.

16 Q Let me stop you there for a minute. I don't
17 mean to interrupt. Let's assume for the
18 sake of this discussion that it was a
19 primary adenocarcinoma of the lung. What
20 other pieces of the picture did you have
21 available to you when you determined it was
22 secondary to secondhand smoke?

23 THE WITNESS: Can I ask a favor?
24 Can I review this chart? Because everything
25 seems to be coming -- can I review the chart

1 because it seems to me like I have gotten
2 pieces. Is that possible before I answer?

3 MR. OHLEMEYER: I would have
4 expected, Doctor, these attorneys might have
5 suggested you do that before the deposition.

6 THE WITNESS: I did, but the chart
7 was not available.

8 MR. JAS. YOUNG: Wait a minute.

9 MR. OHLEMEYER: Let me finish my
10 sentence. I'm perfectly happy to let you
11 take as much time as you would like and
12 review anything you would like to review.

13 THE WITNESS: Let me tell you this
14 chart was not available. I have reviewed
15 the chart that was made available to me. We
16 called over this morning, and the hospital
17 surprisingly loses the chart again. You can
18 ask Sylvia about this. It's awful funny
19 this stuff happens. I've been trying to be
20 prepared for this deposition. Believe me.

21 MR. JAS. YOUNG: I suggest we take
22 a lunch break and allow her time to organize
23 the chart in a manner that she can testify
24 from it. Otherwise, it's not to her benefit
25 or your benefit to continue the deposition.

1 MR. OHLEMEYER: Let me do this.
2 Let's move on to some other areas of
3 inquiry, Doctor. By the time we get to a
4 lunch break --

5 MR. JAS. YOUNG: I feel we should
6 take a lunch break at this time so the
7 doctor has --

8 MR. OHLEMEYER: Counsel, we have a
9 lot to cover and a very short period of time
10 to do it in. And I'm not going to spend any
11 more time than I need. We will take a lunch
12 break. The doctor can spend as much time as
13 she needs. But I have some questions I want
14 to ask her before we break for lunch.

15 MR. JAS. YOUNG: It's 10 till
16 12:00. It's an appropriate time to take a
17 lunch break. She is not able to talk about
18 the documents in a coherent fashion,
19 disorganized the way they are. This is an
20 appropriate time to let her reorganize the
21 documents so that she can give clear answers
22 to you.

23 MR. OHLEMEYER: I have no
24 disagreement with that, counsel. What I
25 want to do before we break for lunch is ask

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1 Sylvia collected?

2 A Yes.

3 Q And then we could determine whether or if
4 Exhibit 3 was part of any of that?

5 A Yes.

6 Q If it wasn't on the microfilm and it's not
7 in the records Sylvia collected, where do
8 you think it came from?

9 MR. JAS. YOUNG: I will object.

10 You are asking her to speculate.

11 A I don't know.

12 Q Do you have a file on Mildred Wiley
13 somewhere else that Sylvia wouldn't have had
14 access to?

15 A Sylvia doesn't normally have access to my
16 files. I have turned over everything that I
17 had, several months ago, to the attorneys so
18 they could give you copies of everything.
19 And if that was in that file, it would have
20 been turned over to you.

21 Q So as we sit here today, you don't think
22 this was something you gave to the attorneys
23 several months ago, this being Exhibit 3?

24 A No.

25 THE WITNESS: Had you seen that?

1 MR. RILEY: I've never seen it.

2 Q When you dictated this, do you have any
3 record of who you would have shared this
4 with, Exhibit 3? Did you send it to
5 anybody?

6 A No, not that I am aware of.

7 Q Do you have a standard procedure whereby
8 your secretary takes these kinds of notes
9 and put them into the file?

10 A They would be put into the chart.

11 Q So it would have been standard procedure for
12 you to have dictated this and your secretary
13 to put it into the chart at or near the time
14 it was dictated?

15 A Yes.

16 Q How often do you dictate progress notes on
17 patients who have died two years before the
18 date of the dictation?

19 A It depends on what's happening with them.
20 If there's legal -- any type of legal or if
21 if I've had family discussions, I have had
22 patients that families call me regarding
23 what they did at the time, and I dictate
24 things there for legal purposes just so we
25 have documentation.

24 A I am sure they had the death summary. I
25 would think they would have. Most attorneys

1 do that, don't they? They make some type of
2 homework before they call and start up
3 something?

4 Q The good ones do. At some point then after
5 you dictated it, it became lost?

6 A Sometime, yes.

7 Q And the reason you believe it became lost is
8 because you discovered it this morning after
9 having reviewed --

10 A I discovered it when you handed it to me.

11 Q You will have to let me finish. And that's
12 my point is in the interim, since May of
13 '93, and the point in time where I handed
14 Exhibit 3 to you, you had looked through the
15 chart and it, according to your
16 recollection, wasn't there?

17 A The chart that we had in this office -- and
18 you can ask Dr. Songer the same thing -- we
19 could not find. If this wasn't part of the
20 chart, then obviously it didn't end up on
21 microfilm or this would be a copy. This is
22 an original. And I don't know where it
23 went.

24 It was not in my chart last night. It
25 was not in my files last night. The first

1 time I saw it is when you handed it to me
2 just now.

3 MR. JAS. YOUNG: This being
4 Exhibit 3.

5 MR. OHLEMEYER: Exactly.

6 Q Is it possible, Doctor, you dictated
7 additional progress notes between May of '93
8 and October 21, 1997, that relate to Mildred
9 Wiley that became lost?

10 A I'm not aware of any. There could be.
11 Certainly not within the last three years,
12 three to four years. Since 1993 or 1994,
13 most likely not, because I have not -- I've
14 gone about my practice.

15 Q What about prior to '93?

16 A Unless there was a specific question
17 regarding that patient, there was no reason
18 to.

19 Q Did you meet with the attorneys,
20 Mrs. Wiley's attorneys, in advance of this
21 deposition to describe or discuss the
22 medical records or your opinions?

23 A I think I have met maybe two to three times
24 in the last -- since whenever, since I first
25 found out about this chart -- this case. A

1 couple times ago, they asked me for all the
2 records that I had. I brought a whole file
3 in. They went through them. And I think
4 they were going to send you all these.

5 Q Have you ever talked with any other
6 individuals who have been identified to you
7 as potential witnesses in this case?

8 A Have I talked to anybody? Just Dr. Songer.

9 Q What about Dr. Burns? Do you know
10 Dr. Burns, David Burns?

11 A I remember the name. But I don't know. I
12 mean, it's a very long time ago.

13 Q What did you tell Mr. Wiley's attorneys
14 about Exhibit 3 during the break we took
15 after we marked it and identified it as an
16 exhibit?

17 A I don't know where it came from. I mean, I
18 dictated it. I know I dictated it. And I
19 have no idea where it came from after that.
20 I have not seen it for several years.

21 Q Did you have a chance to read it during the
22 break?

23 A Yes.

24 Q Does it refresh your recollection as to when
25 and why and how you prepared it?

1 A Again the question arose of whether this
2 case was related to secondhand smoke. This
3 is that whole -- that is why this was
4 dictated.

5 Q And was that a question posed to you by the
6 attorneys?

7 A Yes.

8 Q We will take a break here in a second. You
9 see the first sentence here, it says, "A
10 long discussion ensued"?

11 A Yes.

12 Q Can you explain to me what that means?

13 A Well, I had discussions with Dr. Songer.
14 And I also had discussions with
15 Dr. Stephens. I was asking several of my
16 partners, Dr. Kocoshis, regarding this case
17 because I wanted to make sure that they
18 concurred and that all the questions could
19 be answered.

20 Q The questions about the cause of
21 Mrs. Wiley's cancer?

22 A Yes.

23 Q And you wanted to be sure they concurred
24 with your opinion.

25 A No, not my opinion. The evidence.

3 A I had already developed the opinion. But
4 you need other individuals, pathologists, to
5 concur, to review everything again.

9 | A Yes.

12 (The deposition recessed for lunch
13 from 11:56 a.m. to. 1:25 p.m.)

15 BY MR. OHLEMEYER:

18 A Yes.

19 MR. HOWARD: At this time, the
20 plaintiff would move for a continuation of
21 this deposition until a later date.
22 Documents have mysteriously appeared this
23 morning according to Dr. Turner. Now
24 there's been some confusion as to which
25 documents were missing. She has not had an

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Furthermore, Dr. Songer's deposition is scheduled for tomorrow. They share the file. Dr. Songer has not had an opportunity to review those documents. It would be our request that all of the documents that are here on the table that have been produced here this morning, that we have one set that everybody agrees on as all of the records.

There have been some records produced -- and I think that was Exhibit No. 3 -- which this witness had not seen for three years, which appears to be an original copy and not a microfiche copy. It's a document that none of the plaintiffs' attorneys when we requested the file, that part of the file that mysteriously appeared this morning was missing from that file and appeared here today.

I think in all fairness to the plaintiffs, to this witness, and to Dr. Songer, that his deposition should be

1 continued; and she should have an
2 opportunity, rather than to be handed a
3 document that she hasn't seen for three
4 years and asked about a statement or
5 something there, that she should be able to
6 have an opportunity to review that.

7 Doctor, have I pretty much stated
8 what's happened here today as far as the
9 missing file?

10 THE WITNESS: Yes.

11 MR. HOWARD: And it's now your
12 opinion this is mixed up, and you don't know
13 which is from what and what you have
14 reviewed and what you haven't had an
15 opportunity to review?

16 THE WITNESS: Yes.

17 MR. HOWARD: Would you like an
18 opportunity to have this entire file for you
19 to review and continue the deposition until
20 a later date?

21 THE WITNESS: Yes.

22 MR. OHLEMEYER: Mr. Howard, I
23 obviously cannot force the witness to remain
24 and be deposed. She has been designated as
25 an expert on behalf of your client.

1 Likewise, I can't force Dr. Songer to
2 appear for the deposition. Although, there
3 may be some discussion that needs to be had
4 about whether or if he has been subpoenaed
5 or you have acquiesced in producing him as
6 if he were subpoenaed.

7 But let me say this: There is a
8 discovery cutoff in this case of
9 November 4th. There is a variety --
10 there's a lot of testimony we could take
11 from this witness that has nothing to do
12 with Exhibit 3. It has nothing to do
13 perhaps with the facts specific to
14 Mrs. Wiley contained in the medical records
15 that you have described.

16 And I would encourage you -- and I
17 would be happy to give you as much time as
18 you need to talk with your cocounsel to
19 think about it -- to allow us to continue
20 as much of this deposition as we can fairly
21 continue today. The witness and her
22 lawyers are certainly free to defer
23 questions until and unless she has an
24 opportunity to review additional
25 information.

1 But at this point, I would prefer to
2 continue questioning in areas we can
3 continue questioning, in order to make some
4 progress toward completing discovery in
5 this case in a timely manner. I would also
6 ask that before we adjourn this deposition,
7 if that's what you decide to do, that you
8 provide us with some dates in advance of
9 November 4th when we can continue it.

10 But I would really encourage you all
11 to talk amongst yourselves and talk with
12 the doctor about proceeding with as much as
13 this deposition as can be accomplished in
14 advance of the doctor's review of the case-
15 specific medical records.

16 MR. HOWARD: You would want to
17 proceed without referring to any documents,
18 any of her records?

19 MR. OHLEMEYER: There are some
20 questions I can ask the doctor that have
21 nothing to do with the medical records or
22 her diagnosis and treatment of Mrs. Wiley.

23 And certainly with the understanding
24 that any progress is better than no
25 progress, I think we can certainly do that.

1 And when it's appropriate, the doctor can
2 certainly say, "I can't answer that
3 question until and unless you give me a
4 chance to look at the records."

5 But I think there's a significant
6 amount of testimony that we could take that
7 has nothing to do with the facts or
8 opinions described in the records in front
9 of her that might help move the case along.

10 MR. HOWARD: We have had quite a
11 bit of that already I think, testimony that
12 had nothing to do with Wiley's records. I
13 don't see how meaningful it would be for us
14 to stay here if you're not going to be
15 asking her questions that would require her
16 to rely upon her medical records.

17 MR. OHLEMEYER: If what you are
18 telling me -- see that's the problem here.
19 This witness has been proffered as something
20 more than a fact witness. She has opinions.
21 She has opinions that are based on things
22 that have nothing to do with these medical
23 records. I would like an opportunity to
24 inquire about those opinions. And I think
25 I'm entitled to inquire about her

1 qualifications, about her background, about
2 her education, about her experience, about
3 her potential bias.

4 There are a lot of things that I think
5 are fair subjects of inquiry that aren't
6 related to these specific records. I'm a
7 reasonable person, and we're all reasonable
8 people. I think amongst this group of
9 people, making some progress this afternoon
10 would be preferable to going home.

11 MR. HOWARD: Okay. But I don't
12 really see the purpose of doing that. If we
13 are going to have to come back here anyway,
14 why would we waste our time here having you
15 ask questions that have nothing to do with
16 the medical records. If we have got to come
17 back for that anyway, can't we do that
18 another day and you can ask her more about
19 her qualifications and --

20 MR. OHLEMEYER: Sorry to interrupt.
21 I'm not sure that all of that could be
22 accomplished in a day. It seems to me
23 anything we can accomplish today is another
24 hour we won't have to accomplish down the
25 road. And it would be the fairest and most

1 appropriate use of everybody's time.

2 I mean, you've chosen the date.
3 You've produced the witness. You
4 presumably had the witness prepared to
5 describe the opinions, the facts, the bases
6 of her opinions. Some of those opinions
7 concededly have to do with medical records
8 she would like a chance to review. Others
9 of those opinions don't. I think it would
10 be the most appropriate use of everybody's
11 time, rather than cancelling two days of
12 depositions, to proceed.

13 MR. HOWARD: I guess maybe I need
14 to understand more of what you plan to ask.
15 You're saying you're going to ask her
16 opinions she might hold concerning Mildred
17 Wiley's condition. But those opinions would
18 be drawn from the records that I think she
19 should have a chance to review.

20 MR. OHLEMEYER: There are a number
21 of opinions this witness has expressed in
22 the letter that has been provided to us as
23 in lieu of her 26(b)(4) interrogatory
24 response. Those opinions are not directly
25 related to the medical records. Presumably,

1 the witness could be -- could testify about
2 those opinions, the basis for those
3 opinions, without reference to or resort to
4 information from those medical records.

5 To the extent that we've been given
6 that letter and told it is the expression
7 of this witness's opinions, I think that I
8 should be -- and I had arrived today
9 prepared to ask about and I assume you had
10 prepared the witness to testify about
11 those.

12 MR. HOWARD: You arrived with some
13 documents that we never saw; that the
14 witness hadn't seen for three years.

15 MR. OHLEMEYER: I don't want to
16 interrupt. Let's make this very clear. I
17 arrived with nothing. Every document that
18 has been marked as an exhibit and is on the
19 table right here was given to us this
20 morning by the witness. And the witness has
21 testified to that. I did not arrive with
22 Exhibit 3. I want to make sure that's very
23 clear.

24 MR. HOWARD: Exhibit 3, did you
25 give that document to Mr. Ohlemeyer this

1 morning?

2 THE WITNESS: I'm not aware that I
3 did. I have not seen that document for over
4 three years.

5 MR. OHLEMEYER: Now, wait a minute.
6 Let's make this very clear, gentlemen. You
7 were witnesses. And if you want, we will
8 take everybody's deposition in the room.
9 You saw what the witness handed to me. You
10 saw that we carried it over and put it on
11 the table. And you saw that we started
12 asking questions about it.

13 I don't think of you are seriously
14 telling me and suggesting to me that I
15 arrived with Exhibit 3 this morning. Is
16 that the record you are trying to make?

17 MR. HOWARD: I'm not suggesting
18 anything. That's what the witness said.
19 She did not give you document 3.

20 Mr. Ohlemeyer, I know you asked the
21 gentleman behind you -- he had some of the
22 records. You asked him, "Give me tab
23 three," or something like that. The
24 witness sat right there. And we can check
25 the transcript.

1 MR. OHLEMEYER: The witness did not
2 hand me Exhibit 3. Exhibit 3 was found
3 within the materials that the witness
4 provided us this morning from her briefcase
5 and from the other materials that we
6 produced.

7 THE WITNESS: I have not seen that
8 letter or that note for three years. I'm
9 just telling you. And I have gone through
10 those files.

11 MR. OHLEMEYER: I don't disagree
12 with you, Doctor. Mr. Howard, that's not
13 the issue. The issue at this point isn't
14 where Exhibit 3 came from. It is the
15 doctor's dictation.

16 MR. HOWARD: We want to make sure
17 we have everything here; that we have a
18 chance to review; that she has a chance to
19 review in its totality so she won't be a
20 handed document and asked about it. I think
21 if we are going to have to come back another
22 day, we might as well come back and do it
23 all. If you were going to do it all in one
24 day today, you can do it all in another day.

25 MR. OHLEMEYER: If we are coming

1 back another day so that your expert can
2 testify about the subject matter and basis
3 of her opinions that have been expressed to
4 us in her letter, that was described to us
5 as surrogate for her 26(b)(4) response, we
6 are doing it at your expense, not our
7 expense, because we came here today at our
8 expense to take a deposition that had been
9 described to us as a deposition of this
10 witness as an expert in this case.

11 MR. HOWARD: And I think she has
12 every right to have in front of her all of
13 the documents and have a chance to review
14 all of those documents before you
15 interrogate on those opinions.

16 MR. OHLEMEYER: You had an
17 obligation to prepare her to do that before
18 you brought us all here at our expense to do
19 that.

20 MR. YOUNG: The evidence is that
21 the records were found mysteriously --

22 MR. OHLEMEYER: A record.

23 MR. YOUNG: Not a record, a stack
24 of rubber banded records that were found in
25 the bottom of her drawer.

1 As far as the time is concerned, we
2 were told six hours was the time limit that
3 was necessary to take the deposition today.
4 In fact, I said we had four available. And
5 I was told you better make it six.

6 We've done two and a half hours. I
7 don't see why you don't feel as though the
8 interrogation can be finished in a day's
9 time the next time we get together.

10 MR. OHLEMEYER: That's not an issue
11 we need to decide today. What we are here
12 today is to take a deposition of a woman who
13 has been described to us as having certain
14 opinions. And those opinions are described
15 in her letter of July 20, 1993.

16 Now, I want to ask this witness
17 questions about those opinions. Some of
18 those questions may bear upon medical
19 records that you and the witness have told
20 us she wants more time to review. Let's
21 agree to disagree about whether or if
22 that's an appropriate preparation of an
23 expert.

24 My point is this: There are questions
25 that can be asked. There is testimony,

1 there are opinions that can be inquired of
2 that have nothing to do with those records.
3 We're here. We have paid to be here. Our
4 clients are paying us to be here. We're
5 entitled to ask those questions.

6 If you want to adjourn this deposition
7 and Dr. Songer's deposition, my suggestion
8 is that you may be doing it at your
9 expense, not my expense. I can't make this
10 deposition continue. We haven't subpoenaed
11 this witness. The next time we depose her
12 we will.

13 All I'm asking you to do, gentlemen,
14 is to take a minute, talk amongst
15 yourselves, and decide if everybody's time
16 might not be better spent by us using a few
17 hours this afternoon to inquire of this
18 witness as to other opinions and other
19 facts and other bases that she may have for
20 those opinions that can be inquired of
21 without resorting to those medical records.

22 MR. YOUNG: We will talk. But I
23 will tell you that they are inextricably --
24 the issues are inextricably intertwined with
25 the medical records that concern Mildred

1 Wiley. And, therefore, it's hit or miss.

2 MR. OHLEMEYER: Mr. Young, I don't
3 want to interrupt. No, it's not. What this
4 witness knows about lung cancer and the
5 etiology of lung cancer is not inextricably
6 intertwined with these medical records.

7 What this witness studied in medical
8 school, what this witness may hold as a
9 bias or a prejudice has nothing to do with
10 these medical records. Those are all fair
11 areas of inquiry. You know they are fair
12 areas of inquiry. And they could be
13 accomplished today without any additional
14 wasting of this witness's time or our time.

15 The fact of the matter is if this were
16 September 10th, it would be a different
17 question. But it's October 21st. And we
18 have got a lot to do and a real short
19 period of time to do it. All I'm
20 suggesting is you guys talk about whether
21 we can't make better use of this afternoon
22 than everybody going home.

23 MR. TITTLE: Let me say two or
24 three things, too, because you alluded. I
25 don't think it's fair to say we had any

1 agreement that this would only be six hours.
2 We had a conversation about time, and I
3 think we were talking approximately.

4 Secondly, the witness is here under a
5 subpoena. Bill misspoke. There was a
6 subpoena delivered to her office. And I
7 wrote to Will Riley and said you can assume
8 that subpoena is continued and got no
9 objection, so she is continued.

10 As for Exhibit 3, I will tell you I
11 found it in the stack of documents that the
12 doctor handed over to Bill Ohlemeyer when
13 we walked this room. I'm the person who
14 found it. It was buried down in the middle
15 of the stack, the stack that she carried
16 into this room.

17 MR. WAGNER: I want to say on
18 behalf of R.J. Reynolds that we certainly
19 object to this deposition being continued.

20 And the record in this case is quite
21 clear. The only document that this witness
22 has expressed some surprise about as not
23 having seen for a while is Exhibit 3. She
24 is and should be familiar with the medical
25 chart that's involved in this case. It's

1 present here in the room.

2 One of the things we talked about this
3 morning that's on the record is she wanted
4 a chance to review that over the noon hour.
5 Presumably she has. I personally don't see
6 why she can't be asked questions about
7 anything and everything.

8 She's a doctor. Her recollection can
9 be refreshed by looking at whatever
10 documents she wants to look at. And there
11 isn't any real need for any kind of
12 continuance to do anything. The only
13 document that's been talked about is one
14 she hasn't seen for a while, which she
15 admits is her document that she dictated,
16 is Exhibit 3. There's no ground for
17 continuing this deposition.

18 Everybody has traveled long distances
19 to be here. We have made arrangements to
20 do this. The discovery cutoff in this case
21 is November 4th. And we should continue
22 with this deposition.

23 MR. BYRON: On behalf of CTR, I
24 wish to also give the same objection. It's
25 real clear to me that there's no real basis

1 here for the continuance of this deposition.
2 Everybody should have come here prepared,
3 including the witness.

4 And it's her progress notes that we
5 were talking about in Exhibit 3. We're
6 entitled to her recollection and also to
7 test her memory. And if after she reviews
8 that document, I'd be very surprised to
9 hear her say that she can't remember what
10 she might have written back when she did
11 the progress note. It's isn't our
12 document. It's her document.

13 THE WITNESS: I did not say I
14 cannot remember. I just said I had not seen
15 that for three years.

16 MR. HOWARD: How many of you would
17 feel comfortable representing your client to
18 come to a deposition by subpoena or
19 whatever. And you can say this is our
20 witness. We didn't manufacture her. She is
21 a fact witness.

22 How many of you gentlemen would feel
23 comfortable coming to a deposition when a
24 stack of documents that you had never seen
25 and a witness that's going to give

1 testimony on is going to be pulled out? Is
2 that giving us an opportunity to fairly
3 represent our client? If there's
4 documents -- when we asked for them, they
5 weren't there. The file was lost. They
6 have never been there.

7 They mysteriously appear this morning.
8 And we have never as attorneys representing
9 Wiley, never had the opportunity to even
10 review those documents. So how many of you
11 would feel comfortable? Naturally, you can
12 sit there and say we had the documents.
13 And it's unfair to continue this
14 deposition. I'm talking about basic
15 fairness as a lawyer that we should have
16 the right to go through those documents
17 too.

18 She's testified that she didn't see
19 that document; that those documents appeared
20 this morning. And you can say we had a duty
21 to prepare her. How can we prepare her on
22 documents we never even had access to?

23 MR. OHLEMEYER: That's my point.
24 There's a way to make progress here without
25 anybody having to cast aspersions on the

1 witness's preparation, on her lawyers'
2 preparation, or on our preparation by I
3 think I have graciously, and perhaps in
4 contrast to what Mr. Wagner has said, have
5 agreed to defer questioning on medical
6 records. I think with the exception of
7 Exhibit 3, the medical records we're talking
8 about are records that have been in your
9 possession and in our possession for some
10 time.

11 Whether or if they have been in the
12 doctor's possession is a different
13 question. But my point is this doctor has
14 been produced as an expert. She has been
15 held out to us as an expert. There are
16 opinions that you are all going to want to
17 offer at trial that are not inextricably
18 related to those records. I want an
19 opportunity to inquire about those
20 opinions.

21 It seems to me that would be the best
22 and fairest and most expeditious use of
23 everybody's time. All I'm suggesting is we
24 all stop talking and you all take a minute
25 and discuss the matter. I mean, I can't

1 make you stay here.

2 MR. HOWARD: Do you want to caucus?

3 MR. YOUNG: All right.

4 (A recess from 1:41 p.m. to 1:43 p.m.
5 was taken.)

6 MR. CROSS: From the plaintiffs'
7 perspective, we don't have any intention of
8 going forward with this deposition today.
9 We can go around the table, and all of us
10 can give our respective reasons why we
11 object or whatever. But the bottom line is
12 there's a whole raft of documents that
13 showed up for the first time this morning
14 that this witness hasn't seen. We don't
15 know whether we have seen them or not.

16 You can say there are no other
17 documents beside Exhibit 3 we have not had
18 an opportunity to see and the witness has
19 not been able to see. But we don't know
20 that. And we're not going to be able to
21 know that until we have an opportunity to
22 go through them all.

23 Now, you can say she's being produced
24 as an expert. To some extent, perhaps she
25 is. I'm not associated with that part of

1 the case. However, I think we've got the
2 same problem with a whole herd of other
3 documents. We don't know to what extent
4 the documents that she is relying upon to
5 give these opinions have showed up in
6 documents.

7 Now, you have had a good time this
8 morning asking her questions from documents
9 that she hasn't had an opportunity to see
10 yet before she is expected to answer the
11 question. I don't think it's fair at all
12 she be asked to render opinions, give any
13 kind of comment on anything, until she has
14 had an opportunity to organize this
15 material that's been given to her. And we
16 can explore for a moment the circumstances
17 surrounding this.

18 Plaintiffs are going to suggest to the
19 witness, again, that we continue this
20 deposition to a later date. We do not have
21 any intention of paying the cost of
22 associated counsel coming back here.

23 And if you want to, we can try and
24 enlist the Court's assistance this
25 afternoon to rule on some of these issues.

1 But that seems to me to be where we should
2 go with this rather than sitting here and
3 arguing with each other on the record.

4 MR. OHLEMEYER: A couple of
5 questions. And I realize you may not be
6 associated with this part of the case. Is
7 this witness expected to offer expert
8 testimony at the trial of this case or is
9 she a fact witness?

10 MR. YOUNG: She is a fact witness
11 that will talk about prognosis, causation,
12 just like any other medical treating
13 physician would testify in any tort claim.

14 MR. OHLEMEYER: So she is not being
15 offered as an expert to offer opinions about
16 matters beyond her --

17 MR. RILEY: She will offer some
18 limited opinions.

19 MR. OHLEMEYER: Is she an expert
20 within the scope of Rule of --

21 MR. RILEY: Scope of Rule 26(b).

22 MR. OHLEMEYER: And Rule 701?

23 MR. RILEY: Yes.

24 MR. OHLEMEYER: Okay, she is. And
25 I take it, Dr. Turner, and if you need to

1 avail yourself of the advice of hospital
2 counsel, go right ahead.

3 MR. CROSS: He is sitting right
4 over here.

5 MR. OHLEMEYER: I know that. Even
6 though you've been subpoenaed, I take it you
7 are not interested or not inclined or not
8 willing to continue with the deposition
9 without regard to what Mr. Wiley's lawyers
10 think?

11 THE WITNESS: I want to make sure
12 that all the information that's brought to
13 this table I have seen.

14 MR. OHLEMEYER: Now, Mr. Cross,
15 when might we continue this deposition?

16 MR. CROSS: What is your schedule,
17 Dr. Turner?

18 THE WITNESS: It's horrible. I
19 have to cancel office hours again. Tuesday.
20 Let me know. I will try to cancel office
21 hours again, and I will try and rearrange my
22 schedule.

23 MR. OHLEMEYER: When might I expect
24 to receive dates for the continuation of the
25 deposition?

1 MR. CROSS: Undoubtedly in the next
2 few minutes, as soon as we can discuss it.

3 MR. OHLEMEYER: Is it your
4 intention to produce Dr. Songer for his
5 intention tomorrow?

6 MR. CROSS: Well, that presumes we
7 have the power to produce Dr. Songer.
8 Dr. Songer is a witness. He is not a party.
9 He is not a client.

10 If he has the same feelings about a
11 significant quantity of documents appearing
12 for the first time after a lapse of several
13 years, I would imagine that he, too, would
14 want to opportunity to review records and
15 make sure that his testimony is based upon
16 all the knowledge that he ought to have in
17 order to give those opinions.

18 I would imagine he will be of the same
19 opinion. But I, of course, can't speak to
20 him; and I have not talked to him.

21 MR. OHLEMEYER: Is he not an
22 expert?

23 MR. CROSS: He is in the same
24 position as --

25 THE WITNESS: He's an oncologist.

1 MR. RILEY: He's an expert with
2 regard to his treatment. I am not offering
3 him for anything aside from his treatment.

4 MR. OHLEMEYER: Do you have any
5 objection to us talking to Dr. Songer about
6 his ability to attend the deposition
7 tomorrow?

8 MR. HOWARD: Have you talked with
9 him about the records that were found?

10 THE WITNESS: Yes.

11 MR. HOWARD: Has he had a chance to
12 look at those records?

13 THE WITNESS: No, he has not seen
14 them.

15 MR. OHLEMEYER: My question,
16 Mr. Cross, do you have any objection to me
17 talking with Dr. Songer, seeing he is a fact
18 witness, about his ability to proceed with
19 the deposition tomorrow?

20 MR. CROSS: Obviously, I don't have
21 any objections to you talking to Dr. Songer
22 at all because he is not within my power to
23 control whether he talks to anyone or not.

24 Insofar as whether or not you want to
25 talk to him about whether he is able to

1 continue on with the scheduled deposition
2 tomorrow or not, I think we would all be
3 interested to know that. Again, it's up to
4 him. I have no objection to you talking to
5 him. But I don't see that makes any
6 difference.

7 MR. HOWARD: We certainly want to
8 be present.

9 MR. TITTLE: Let's bring him in.

10 THE WITNESS: Do you want me to go
11 get him?

12 MR. CROSS: Is he here?

13 THE WITNESS: He is probably seeing
14 patients, unless he is down in emergency.

15 MR. OHLEMEYER: Mr. Cross, let me
16 make sure I have the record straight. We
17 are adjourning the deposition of your
18 expert, Dr. Turner, at your request based in
19 part upon the witness's request she be
20 afforded an opportunity to review medical
21 records and hospital records pertaining to
22 Mrs. Wiley.

23 We are doing so over our objection and
24 without waiver of our intention to consider
25 whether or if the subsequent scheduling and

1 attendance at the deposition is at our
2 expense or your expense.

3 MR. CROSS: With the exception that
4 I think the Court could be available this
5 afternoon to argue that issue right now, if
6 you want.

7 MR. OHLEMEYER: The Court arguing
8 what issue?

9 MR. CROSS: Ruling on your
10 objection.

11 MR. OHLEMEYER: The expense?

12 MR. CROSS: Ruling on your
13 objection.

14 MR. OHLEMEYER: Our objection to
15 what?

16 MR. CROSS: To continuing this
17 deposition.

18 MR. OHLEMEYER: You don't
19 dispute --

20 MR. CROSS: Let me finish. You are
21 objecting to the continuation of this
22 deposition, are you not?

23 MR. OHLEMEYER: I'm objecting to
24 its suspension. You certainly don't dispute
25 our right to continue the deposition, do

1 you?

2 MR. CROSS: Certainly not. You're
3 objecting to continuing the deposition.

4 MR. OHLEMEYER: Continuing the
5 deposition. You and I both know that no
6 judge in the world, including Judge Barnett,
7 is going to make us all sit here and ask a
8 doctor questions who doesn't want to answer
9 questions, for whatever reason. And I'm not
10 suggesting that. But all I'm suggesting is
11 that we are not waiving any argument we
12 might eventually present to the Court about
13 whether or if this doctor should have been
14 prepared to do this before we all got here.
15 Nobody disagrees with that.

16 MR. HOWARD: Except about the cost
17 issue. This will bankrupt our case if we
18 have to pay for all those guys to come back.

19 MR. OHLEMEYER: Let's go off the
20 record.

21 (Discussion off the record from 1:50
22 p.m. to 1:52 p.m.)

23 MR. OHLEMEYER: The record should
24 reflect that we imposed upon Dr. Songer to
25 step into the room in the presence of

1 counsel and Dr. Turner. And it is my
2 understanding that Dr. Songer is noticed for
3 and may have been subpoenaed for a
4 deposition tomorrow. That relates to his
5 involvement in the diagnosis, treatment, or
6 care of Mildred Wiley.

7 Counsel for Mr. Wiley have suggested
8 that Dr. Songer may not be prepared for
9 that deposition and may indeed desire to
10 continue it. And all we would really like
11 to know, Doctor, is whether that's a fair
12 statement of your situation and, if so,
13 when we might expect to schedule your
14 deposition.

15 DR. SONGER: I'm not as prepared as
16 I would have hoped to be. We had undertaken
17 the first part of the week to get the full
18 records from the hospital stay, which would
19 include progress notes, lab tests, X-ray
20 reports.

21 I had an overview of those records
22 that had come to us as it turns out through
23 a microfilm that had been done on the
24 original chart which we keep here in our
25 office. But I was feeling uncomfortable

1 not having had time to go over these most
2 recent series of tests.

3 MR. OHLEMEYER: When you say "we,"
4 who do you refer to by "we"? You said we
5 had collected or we had reviewed.

6 DR. SONGER: I'm not sure.

7 MR. OHLEMEYER: It was your word,
8 Doctor, not mine.

9 DR. SONGER: In reference to what?

10 MR. OHLEMEYER: You said we had --
11 do you want to read back the beginning of
12 the answer? Maybe I misunderstood
13 something.

14 MR. YOUNG: Wait a minute.

15 MR. OHLEMEYER: Excuse me.

16 MR. YOUNG: You wait a minute. He
17 is not under oath here. And he is not your
18 deponent to testify. He came in here as a
19 courtesy to talk to us about whether he is
20 ready to give a deposition tomorrow. And
21 the question is whether he feels prepared.

22 The point I was trying to make before
23 we went on the record was that this office
24 shares a file. And portions of that file
25 were found mysteriously in Dr. Turner's

1 file cabinet this morning that were not in
2 there last night as of at least midnight or
3 12:30.

4 Dr. Turner has testified that
5 Dr. Songer hadn't had a chance to look at
6 the documents either. The question is
7 whether he feels comfortable, if he is able
8 to give his deposition in light of all
9 those facts tomorrow. If he is, fine. If
10 he is not, that's what we brought him in
11 here to ask him.

12 MR. OHLEMEYER: Doctor, you don't
13 have to listen to all this. We have a lot
14 of people here from all over the country.
15 Your deposition was scheduled at a time that
16 was represented to us as convenient to you.
17 It's not scheduled until tomorrow afternoon.
18 My question I guess, and our question or
19 interest is, do you think you will have a
20 chance between now and tomorrow afternoon to
21 look at this material so that we can
22 accomplish this deposition and not have to
23 continue it, not have to bring everybody
24 back from all over the country to take it?

25 DR. SONGER: I had planned to be

1 prepared today with my review because I'm on
2 call today through tonight and through
3 tomorrow. I'm not sure that I'm going to
4 have time to go over that entire chart to
5 feel like I will have done the review that I
6 would prefer to do.

7 MR. OHLEMEYER: As you might
8 understand and know, there are certain
9 deadlines that have been imposed upon us by
10 the Court in terms of preparing this case.
11 When might you be available that we can
12 schedule your deposition?

13 DR. SONGER: If we are able to get
14 all this information together, I would say a
15 week or two weeks would be a reasonable time
16 for me to go over it.

17 MR. OHLEMEYER: Let's say, for
18 example, if we had a chart today and we put
19 it in front of you, what more would you need
20 to do to refresh your recollection or review
21 portions of the chart that pertain to your
22 treatment or diagnoses?

23 DR. SONGER: That would be
24 basically what I would plan to do, go into
25 the hospital record.

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1 Consultants on this patient was not anywhere
2 to be found.

3 At that point, we became concerned
4 about security. We took precautions about
5 securing the rest of the information
6 relative to her records, including
7 pathology slides, X-rays, and other things
8 that we need, that are needed in order to
9 review this case.

10 I was working under the presumption
11 that we were not going to have access to
12 that at the deposition. That just was not
13 going to be available.

14 Sometime I believe since the first of
15 the week, talking to Dr. Turner, she
16 informed me that one of our people, Sylvia
17 in medical records, had checked for
18 whatever reason in the microfilm area and
19 had found what was presumably the entire
20 chart that we keep here.

21 Unfortunately, that was limited to
22 summaries, did not have -- did not have
23 laboratory tests, X-ray reports, did not
24 have what we call the progress record where
25 I would have handwritten, for example, my

1 interpretation of what was going on and
2 what I might have ordered or recommended.

3 As of earlier in the week, I had asked
4 her to see if that was available, if that
5 information was available from the
6 hospital. The next thing I find out today
7 is that there was a set of records
8 referable to that hospitalization in
9 Dr. Turner's office and that also the
10 medical records department has found, I
11 guess, the original chart and has either
12 prepared or sent a copy of the
13 hospitalization.

14 This is the first I knew of their
15 availability. I was certainly hoping that
16 they would be available so that I could
17 come nearer recollecting and putting into
18 perspective what my recollection of the
19 case was.

20 MR. OHLEMEYER: I take it you are
21 telling me without the records, you don't
22 have an independent recollection or complete
23 recollection of your treatment of the
24 patient? Am I right?

25 DR. SONGER: That's correct. I do

1 not remember this patient relative to what
2 she looked like, where she was in the
3 hospital, and how long she was in the
4 hospital. I just do not remember.

5 MR. OHLEMEYER: And I take it
6 you're telling us that you don't believe --
7 well, I don't want to put words in your
8 mouth. Anywhere from "I'll try, but I can't
9 say until tomorrow I can be ready" until
10 "I'm not going to show up tomorrow," there's
11 a position on that spectrum where you are at
12 this point in time. Can you tell us where
13 you think you are?

14 DR. SONGER: I would be better
15 prepared with a continuance where I could
16 have time to sit down. I don't know at this
17 point what I'm going to find in those
18 records that I need to reflect on. I'm
19 basically at this point limited to my
20 consultation, discharge summary, and autopsy
21 report. And that would be about the extent
22 of what I have had a chance to review.

23 I think when I am able to review the
24 chart relative to what I wrote in the chart
25 and I think --

1 MR. BYRON: But, Doctor, couldn't
2 you finish all that before 2:00 tomorrow
3 afternoon?

4 DR. SONGER: I don't know. I'm on
5 call. I'm waiting now to see patients.

6 MR. OHLEMEYER: To be fair to the
7 doctor --

8 DR. SONGER: I felt I was prepared
9 relative to the information I had. But now
10 there's going to be more information between
11 now and tomorrow. This case is how old? I
12 think it's less than ideal for me to be
13 under a 24-hour gun to review what might be
14 far more information than I have had a
15 chance to review.

16 MR. OHLEMEYER: But I guess,
17 Doctor, the advantage we have you don't have
18 is we know what the chart looks like and
19 what your notes look like. We have had them
20 all. We have obviously spent more time
21 looking at it than you have probably.

22 I think we could all fairly agree they
23 don't seem to be lengthy or extensive. It
24 may be you just don't remember that.

25 MR. CROSS: For the record, the

1 plaintiffs aren't sure of that at all. We
2 are not sure. We have seen documents this
3 morning that none of us have seen before.

4 MR. OHLEMEYER: But not from
5 Dr. Songer.

6 MR. CROSS: We don't know that.

7 MR. OHLEMEYER: Well, I'm telling
8 you that. And I guess you're not going to
9 agree with me. I guess we will have to talk
10 amongst ourselves and decide what happens
11 tomorrow.

12 What we are trying to avoid, Doctor,
13 is a situation where we have to subpoena
14 you for a deposition on a short period of
15 time, at a time that's inconvenient for you
16 that is necessary to comply with some Court
17 orders.

18 So tomorrow is a date that we all, you
19 know, thought we could get this done and
20 get it done. And we still think we could
21 get it done and get it done. But if not,
22 we're trying to avoid a situation where in
23 the next week or 10 days, we just show up
24 and say here's where you have to be and
25 when you have to be there.

1 DR. SONGER: As I say, I don't
2 anticipate I'm going to need a long time to
3 review. But I do want some time to be sure
4 I'm not staying up all night tonight trying
5 to put together this review and come
6 tomorrow not having gone to bed tonight.

7 MR. CROSS: Counsel, I think you
8 have your record. I think the issues you
9 want to preserve are preserved. I think the
10 doctor has clearly indicated that he is of
11 the opinion that he would be at a severe
12 disadvantage to continue with the
13 deposition.

14 So I think we should go ahead and plan
15 the deposition. You can argue to the Court
16 your concerns about the cost of coming back
17 here and those things. But I think we
18 ought to let this man get back to his
19 patients.

20 MR. OHLEMEYER: I don't disagree
21 with that.

22 MR. BYRON: Before we leave, can we
23 get a date set?

24 MR. CROSS: We can do that off the
25 record, Dan.

1 MR. BYRON: It has to agree with
2 his calendar though.

3 MR. HOWARD: Didn't you say a week,
4 Doctor?

5 DR. SONGER: I can't imagine a week
6 or 10 days, whatever. I'm not going to be
7 out of town. As long as I have some time in
8 advance to move patients.

9 MR. BYRON: You think by next
10 Wednesday, you'd be in a position where you
11 could have reviewed the documents and be
12 ready for a deposition?

13 DR. SONGER: If I'm going to have
14 all of the things available to me that would
15 consist of the entire chart.

16 MR. OHLEMEYER: Doctor, the problem
17 we're having is nobody in this room seems to
18 agree as to where or who should do that for
19 you. Are you suggesting that we should
20 prepare a chart for you or that the hospital
21 is going to do that for you or that somebody
22 has done it?

23 DR. SONGER: As of today, I have
24 reason to believe that we have access to
25 this chart.

1 THE WITNESS: This is the chart.

2 MR. HOWARD: That's the medical
3 records.

4 MR. WAGNER: That's the statement I
5 was going to make. I mean, I haven't
6 reviewed those documents, Dr. Turner. But
7 isn't that the chart? Isn't that the Ball
8 Memorial records?

9 THE WITNESS: We hope this is all
10 of it. See, the problem is there are
11 duplications, which is why I had to stop
12 before. It was very out of order. And I
13 believe this is all of it now.

14 MR. WAGNER: That's what I thought.

15 THE WITNESS: This was all mixed
16 up.

17 MR. WAGNER: I mean, the medical
18 records pertaining to the treatment of
19 Mildred Wiley at Ball Memorial Hospital,
20 which reflect the treatment given by
21 Drs. Turner and Songer are right here in
22 this room. And they certainly didn't
23 mysteriously appear. I mean, they were
24 here.

25 The only document that anybody has

1 expressed any surprise about seeing is
2 Exhibit 3.

3 MR. YOUNG: That's not accurate.
4 That stack of material contains the items
5 that were found mysteriously this morning at
6 8:00. And they are interspersed within that
7 document.

8 MR. WAGNER: The stack of records
9 you are talking about are the medical chart
10 pertaining to Ball Memorial?

11 MR. YOUNG: What he is rubber
12 banding right now.

13 MR. OHLEMEYER: The one thing I
14 would object to -- I don't think we need any
15 more of Dr. Songer's time. Wait a minute.
16 I'm sorry. I'm talking to Mr. Howard.
17 Mr. Wagner has some suggestion that this has
18 some question for the doctor about whether
19 there is something he could review between
20 now and 2:00 tomorrow. I don't want to put
21 words in anybody's mouth.

22 MR. CROSS: He has already said
23 twice he doesn't have the time between now
24 and 2:00 tomorrow; isn't that right?

25 DR. SONGER: I can't promise you

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1 identification).

2 MR. CROSS: Here again, this is not
3 his deposition.

4 MR. OHLEMEYER: That's my question,
5 just so there is no misunderstanding about
6 this.

7 THE WITNESS: Why don't you let him
8 see the chart and that would help him.

9 MR. OHLEMEYER: Thank you.

10 THE WITNESS: You're asking him a
11 question, and he doesn't know what's in
12 there.

13 MR. RILEY: If you are going to ask
14 him questions, I think you need to put him
15 under oath.

16 MR. OHLEMEYER: He doesn't need to
17 be under oath. This is not a deposition of
18 him.

19 MR. RILEY: So this is not a
20 deposition useable in court, except for some
21 hearing on something or another?

22 MR. OHLEMEYER: Correct. I'm not
23 interrogating the doctor. We're all trying
24 to help each other out here.

25 MR. BYRON: We are trying to figure

1 out whether we can do this tomorrow or
2 whether we need to go to some other day.

3 MR. HOWARD: He said three times
4 that he can't be prepared to read all the
5 charts. Now, maybe some of you guys back
6 when you were doctors could have done it
7 quicker than that. But this doctor has said
8 he can't be ready tomorrow.

9 MR. BYRON: He is now taking a good
10 faith look at it.

11 MR. HOWARD: Oh, he wasn't telling
12 you in good faith before?

13 MR. BYRON: He hadn't looked at the
14 chart. Now, he is looking at the chart.

15 MR. WAGNER: Do you want to sit
16 down, Doctor? You are certainly welcome to
17 use that chair.

18 THE WITNESS: Joe, I don't know if
19 this goes in there or not. I mean,
20 everything is all mixed up. And this is
21 stuff from outpatient. You might want to
22 look at that as well. Everything is all
23 mixed up.

24 MR. OHLEMEYER: The second stack
25 that Dr. Turner has handed Dr. Songer, we

ought to mark as Exhibit 14.

MR. YOUNG: Where are these things coming from?

MR. OHLEMEYER: From Dr. Turner.

(Exhibit(s) 14 marked for identification).

MR. OHLEMEYER: The third stack Dr. Turner has in front of her I would like to mark as Exhibit 15.

(Exhibit(s) 15 marked for identification).

DR. SONGER: I would stand on the request for a continuance.

MR. OHLEMEYER: Doctor, who should we talk with about finding a convenient time for the deposition?

Sorry, Dr. Turner. I mean Dr. Songer. Should we deal with your office directly?

DR. SONGER: Was it Sylvia?

THE WITNESS: Yes, Sylvia.

DR. SONGER: That would be the person to talk to. I can say as long as I have got -- I'm not going out of town. I can pretty much move patients around if I have a few days' notice. I think a week, in

1 that range, whatever works out to
2 everybody's advantage so I can comply.

3 MR. OHLEMEYER: Thank you, Doctor.

4 MR. BYRON: Doctor, you're saying
5 you think 10 to 12 hours of time you will
6 need for the review?

7 DR. SONGER: Yes. What this does,
8 it gives you time sequences which summaries
9 don't give you. And that's what I need.

10 MR. OHLEMEYER: Thank you, Doctor.

11 BY MR. OHLEMEYER:

12 Q Before we conclude this, let me make the
13 record. We have marked as Exhibit 14 a
14 stack of records that Dr. Turner collated
15 for us, right?

16 A Yes.

17 Q Tell us what you believe these records to
18 be?

19 A These are similar to these, but they have
20 progress notes in them.

21 Q These being Exhibit 13, right?

22 A Exhibit 14 has progress notes. See, the
23 problem is that when you handed all these,
24 they were all mixed up.

25 Q Doctor, just so the record is clear, you're

1 not accusing me of mixing them up?

2 A I am just saying when they are handed to me,
3 they were mixed up. The charts were mixed
4 up.

5 Q And if I suggested to you --

6 MR. CROSS: Let her finish her
7 answer.

8 Q If I suggested to you when they were handed
9 to me they were in that state, you wouldn't
10 disagree with me, would you?

11 A What I handed to you was a group of charts
12 or group of papers that had a rubber band
13 around them that I found in my file. And
14 then I handed you the chart from the
15 hospital. But the rubber band was taken
16 off, and so everything was mixed up. That's
17 one of the reasons why I had to delay this.

18 Q Tell us what Exhibit 13 is.

19 A Thirteen is, wherever this came from, is a
20 chart but without progress notes.

21 Q A chart of what?

22 A A chart from the hospital.

23 Q Pertaining to Mr. Wiley?

24 A To Mrs. Wiley. But this does not have
25 progress notes, so these are probably the

1 progress notes that go through here.

2 Q These being Exhibit 14?

3 A Yes.

4 Q Tell us what Exhibit 15 is.

5 A Exhibit 15 looks like they are copies of
6 microfilm. Where these came from, whether
7 these came from the hospital or from the
8 office -- I doubt if they would be coming
9 from our office. But I can't be certain.

10 Q Now, there's another stack that you handed
11 me to hand to Dr. Songer that we will mark
12 as Exhibit 16. Tell us what that is.

13 A Those are additional -- one is a
14 pathologist's report. One is copies,
15 someone has made an extra copy of a
16 bronchoscopy note. One looks like an
17 outpatient procedure by Dr. Dove on Mildred
18 Wiley dated the 14th of May.

19 And I don't know whether you handed
20 them to me or they are from the hospital
21 chart. These again are from Dr. Kocoshis
22 and Dr. Dickerson, again having to do with
23 radiation.

24 Q And there are some consent forms and
25 authorizations in here, right?

1 A Yes.

2 Q Those are standard Ball Memorial Hospital
3 forms?

4 A Yes.

5 MR. OHLEMEYER: Let's mark those
6 then as Exhibit 17.

7 (Exhibit(s) 16 marked for
8 identification).

9 Q Let me ask you this, Doctor: With respect
10 to the autopsy report that is attached to
11 this group of exhibits we have labeled
12 Exhibit 16, there's a checkmark in the top
13 right-hand corner. There a a Roman numeral
14 I next to the hospital number. And then
15 there's some handwriting here that looks to
16 me like an arrow.

17 MR. CROSS: Just a minute. I
18 thought we were going to continue this
19 deposition. Now, we're going --

20 MR. OHLEMEYER: Mr. Cross, we are
21 making a record. Don't you want an accurate
22 record?

23 MR. CROSS: I don't want you to ask
24 this questions about a document until she
25 has had an opportunity to review it and

1 she's comfortable with it. I think she's
2 already indicated on the record she would
3 like an opportunity to look at all these
4 records.

5 MR. OHLEMEYER: The record is going
6 to reflect that the witness and I are
7 looking at the same document and that I
8 haven't finished my question yet. Once I
9 finish my question, you can make whatever
10 objection you would like.

11 Q But my question, Doctor, is: The autopsy
12 report that is part of Exhibit 16 has a
13 checkmark in the top right-hand corner,
14 right.

15 A Yes.

16 Q Is that your checkmark?

17 A I cannot tell us.

18 Q Are you right handed or left handed?

19 A Right.

20 Q It has a Roman numeral I there, right?

21 A Yes.

22 Q And it has what appears to be an arrow with
23 the letters CA15-3 underlined?

24 A Yes.

25 Q Is that your handwriting?

1 A That's my handwriting.

2 MR. CROSS: Your question is
3 concluded. She has given you an answer.
4 That suspiciously sounds like a question
5 about a document and its contents. I think
6 we have already established we're going to
7 continue this deposition until another date.

8 Now, quit asking the witness
9 questions. You're not making a record
10 pertaining to the continuance or anything
11 else. You're asking her substantive
12 questions about the medical records, which
13 I don't know. Have we seen these records?
14 I don't know that I have.

15 MR. OHLEMEYER: Counsel, you know,
16 five years into a case, every now and then
17 it might help to take a look at some of the
18 medical records.

19 MR. CROSS: You're right about
20 that. We're thinking the same thing this
21 morning.

22 MR. OHLEMEYER: What are we going
23 to do with the exhibits, counsel? Who is
24 going to keep them? Who is going to make
25 copies of them? How are they going to be

1 distributed? How are we going assure
2 ourselves that nothing mysteriously
3 disappears from these exhibits?

4 MR. CROSS: Obviously, I think it
5 would be appropriate at this point in time
6 for a representative of both sides to take
7 over and make sure that an adequate number
8 of copies are made.

9 MR. OHLEMEYER: Why don't we give
10 them to the court reporter and let the court
11 reporter make copies for everybody?

12 MR. FURR: We need to mark the
13 documents that are being copied.

14 MR. OHLEMEYER: For the record, we
15 have an Exhibit 1, which is the Notice to
16 take deposition.

17 For the record, we have Exhibit 2,
18 which is a 5-29-91 admission note.

19 We have an Exhibit 3 which is progress
20 notes dated May 24 and May 25, 1993.

21 We have an Exhibit 4, which is the
22 curriculum vitae of Nicki Carol Turner.

23 We have Exhibit 5, which is a May 13,
24 1993, letter from Dr. Thomas Kocoshis to
25 Dr. Turner.

1 We have an Exhibit 6, which is a memo
2 to all physicians from Stacey Burt dated
3 October 14th, 1996, with handwriting on the
4 back. So that should be a two-sided
5 exhibit certainly.

6 We have an Exhibit 7, which is Tobacco
7 on Trial, Number Four, 1995.

8 THE WITNESS: What does that have
9 to do with the case?

10 MR. BYRON: We are just identifying
11 the documents.

12 THE WITNESS: I know, but why is it
13 an exhibit?

14 MR. OHLEMEYER: Doctor, I would be
15 happy to withdraw it as an exhibit if you
16 would be willing to describe it for us and
17 tell us what it is. But Mr. Cross doesn't
18 appear to think you or I should be asking or
19 answering those types of questions.

20 THE WITNESS: It doesn't matter to
21 me. It has to do with -- it doesn't matter
22 if I answer it.

23 MR. OHLEMEYER: Exhibit 7 is
24 "Tobacco on Trial," November 4, 1995.

25 Exhibit 8 is "Passive Smoking" by

1 Stephen Jay, October 24, 1995.

2 Exhibit 9 and Exhibit 10 are the Ball
3 Memorial Hospital records previously
4 identified as same day surgery sheets; is
5 that right? How would you describe those,
6 same day surgery sheets?

7 THE WITNESS: Yes, ER or same day
8 surgery.

9 MR. OHLEMEYER: Exhibit 11 is the
10 package of materials of medical records
11 provided to you by plaintiffs' counsel; is
12 that right?

13 THE WITNESS: Yes.

14 MR. OHLEMEYER: And I will ask the
15 court reporter to make a copy of the outside
16 envelope with the exhibit sticker and attach
17 the contents as the remainder of the
18 exhibit.

19 MR. HOWARD: May I make a
20 suggestion here? Those are the only records
21 in existence. I don't think if we are going
22 to have these doctors reviewing those, why
23 don't we see if the hospital can't make
24 us -- those are hospital records. I don't
25 imagine they will want those to go out of

1 here today. If we could get an entire set
2 of those run by the hospital, do you think
3 that would be possible, Dr. Turner?

4 MR. OHLEMEYER: I understand it,
5 Mr. Howard, they are not hospital records.
6 That's part of the issue here. They are
7 office records.

8 And I'm certainly happy to let anyone
9 make copies of these records that they
10 would like to make copies of these records.
11 But I would prefer that whatever we do, we
12 keep these exhibits in the current form
13 they are in and have somebody make copies
14 of them as soon as possible.

15 And it seems to me the most
16 appropriate and easiest way to do it is to
17 have the court reporter do it. And he can
18 tell us how quickly he can do it. And he
19 can make any necessary arrangements with
20 the doctors' office to assure the
21 safekeeping of those records as I am sure
22 they do in many other cases.

23 Exhibit 12 is the death summary
24 dictated July 21, 1991 by Dr. Turner.

25 MR. CROSS: She has identified the

1 rest of them.

2 MR. OHLEMEYER: She has identified
3 13, 14, 15, and 16.

4 For the record, we also have a group
5 of exhibits that we have sent out to make
6 copies of.

7 We ought to identify that as
8 Exhibit 17 and distribute copies of that to
9 everybody as soon as possible. One way to
10 do it is to mark a copy as Exhibit 17, have
11 the court reporter take it, and have him
12 make copies for whoever wants copies.

13 Another way to do it would be to
14 painstakingly make a record of every piece
15 of literature that is part of that exhibit.

16 Another way to do it would be to have
17 Mr. Shockley distribute copies as he has
18 already made to everybody. I leave it to
19 you to tell me how you want to do it with
20 Exhibit 17.

21 MR. FURR: Do you need to mark
22 those?

23 MR. OHLEMEYER: I will get to those
24 in a second. What do you want to do about
25 Exhibit 17?

1 MR. WAGNER: For the record,
2 Exhibit 17 is what we are referring to. The
3 documents being copied consist largely of
4 articles, medical articles, and journal
5 articles that largely deal with smoking and
6 smoking-related issues; isn't that right,
7 Doctor?

8 THE WITNESS: Yes.

9 MR. CROSS: I think the record can
10 show that Mr. Shockley took the "original
11 stack" of those documents out of here this
12 morning while the deposition was in progress
13 and took them to a local copy place and
14 established or asked them to make a number
15 of copies.

16 I'm certain they will designate what
17 those originals were. I would simply
18 suggest that we ask the court reporter to
19 go by there on his way out of town and mark
20 the original set of documents as 17 and
21 distribute the copies to the rest of us.

22 MR. BYRON: Mr. Shockley took those
23 documents pursuant to the agreement of all
24 counsel.

25 MR. OHLEMEYER: From that stack, so

1 the record is clear, there were a few items
2 that were not taken to Kinko's. Dr. Turner
3 has produced a number of slides and
4 photographs that she has referred to as the
5 Calvin and Barney stuff or materials; is
6 that correct.

7 THE WITNESS: It's an educational
8 program for children.

9 MR. OHLEMEYER: I understand that.
10 I don't mean to disparage it or diminish it,
11 but that's what that is, right?

12 THE WITNESS: Yes.

13 MR. OHLEMEYER: And we did not take
14 this out to make copies. At this point, I
15 don't want to make copies of it. But if at
16 a subsequent deposition, we asked to you
17 produce the Calvin and Barney envelope,
18 could you do that for us?

19 THE WITNESS: Yes.

20 MR. OHLEMEYER: Also the record
21 will reflect we did not send out the "Health
22 Consequences of Smoking," 1984; and "Health
23 Consequences of Involuntarily Smoking,"
24 Surgeon General's reports. We did not send
25 out the Cigarette Papers by Glantz.

1 We did not send out a newspaper
2 article from the USA Today that was
3 produced by the doctor dated October 18,
4 1996, the "Life" section of that paper.

5 We did not send out a note that
6 appears to be in the doctor's handwriting?

7 A It was one of the secretary's.

8 Q That says: Teresa call Sylvia, 2173,
9 Dr. Turner and Dr. Songer, Mildred Wiley,
10 need by Wednesday at 9:00, asked for above
11 10/20 in black ink.

12 And then in blue ink, there is the
13 number 212912, 24 lawyers, and then the
14 dates 5/91 - 6/24/91. Is that your writing,
15 Doctor, the blue ink?

16 THE WITNESS: No.

17 MR. OHLEMEYER: The record will
18 reflect the back of this note says 3501,
19 tell Diana I've got it and thanks. Again
20 not your handwriting?

21 THE WITNESS: I don't know who
22 wrote that. I don't know if it has to do
23 with this case.

24 MR. OHLEMEYER: Finally the other
25 thing we did not send out for copying this

1 morning was an article entitled, "Indoor
2 Radon and Lung Cancer, Estimating the
3 Risks," by Jonathan M. Samet M.D. The cite,
4 Doctor?

5 THE WITNESS: Biomedical Science.

6 MR. OHLEMEYER: Do you know what
7 issue this was? Does it say?

8 THE WITNESS: Western Journal of
9 Medicine, 1992, Volume 156.

10 MR. OHLEMEYER: And with that then,
11 as I understand it and without repeating the
12 record we have made previously, we are
13 suspending the deposition. Go in peace.

14 MR. FURR: One further comment.
15 There is no agreement there is a limitation
16 of four additional hours.

17 MR. OHLEMEYER: Correct. No one
18 has agreed to that. Thank you, Doctor.

19
20 -----
21 NICKI C. TURNER, M.D.
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23
24
25

STATE OF INDIANA)
)
COUNTY OF MARION)

I, Thomas A. Richardson, a Notary Public in and for said county and state, do hereby certify that the deponent herein was by me first duly sworn to tell the truth, the whole truth, and nothing but the truth in the aforementioned matter;

That the foregoing deposition was taken on behalf of the defendants; that said deposition was taken at the time and place heretofore mentioned between the hours of 8:00 a.m. and 6:00 p.m.;

That said deposition was taken down in stenograph notes and afterwards reduced to typewriting under my direction; and that the typewritten transcript is a true record of the testimony given by said deponent;

And thereafter presented to said witness for signature; that this certificate does not purport to acknowledge or verify the signature hereto of the deponent.

I do further certify that I am a disinterested person in this cause of action; that I am not a relative of the attorneys for any of the parties.